United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,859

890

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition for Review of Order of the Civil Aeronautics Board

---

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX TO JOINT APPENDIX

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United States Court of Appeals

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JOINT APPENDIX

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‡ C. A. B. No. 351

(See Notice on Page 2 hereof)

Original Title Page

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY

AIR CARGO TARIFF No. M-SC-1

NAMING

SPECIFIC COMMODITY RATES AND CHARGES

APPLICABLE TO SHIPMENTS

OF MILITARY STORES/IMPEDIMENTA AS PROVIDED HEREIN

APPLICABLE BETWEEN

POINTS IN THE UNITED STATES OF AMERICA

AND

POINTS IN AFRICA, ASIA, AND EUROPE

ALSO BETWEEN

POINTS WITHIN THE UNITED STATES OF AMERICA

Governed, except as otherwise provided herein, by Local and Joint Air Cargo Tariff No. CR-3, C.A.B. No. 193, including supplements thereto, revisions and reissues thereof, issued by R. C. LOUNSBURY, AGENT.

For explanation of abbreviations, symbols and reference marks, see Page 2.

ISSUED:	Issued by	EFFECTIVE:
APRIL 1, 1964.	R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM PAN AM Building, New York 17, N. Y.	MAY 1, 1964.

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

Original Page 1

CORRECTION NUMBER CHECK SHEET

Each time revised or additional original pages are received check marks should be made on the check sheet opposite the correction numbers corresponding to those appearing in the lower right-hand corner of the revised or additional original pages. If pages should not be received bearing consecutive correction numbers, the issuing agent should be requested to furnish the page bearing the correction number for which a page has not been received.

CORRECTION NUMBERS

~~1~~	41	81	121	161	201	241	281	321	361	401	441
2	42	82	122	162	202	242	282	322	362	402	442
3	43	83	123	163	203	243	283	323	363	403	443
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~~5~~	45	85	125	165	205	245	285	325	365	405	445
6	46	86	126	166	206	246	286	326	366	406	446
7	47	87	127	167	207	247	287	327	367	407	447
8	48	88	128	168	208	248	288	328	368	408	448
9	49	89	129	169	209	249	289	329	369	409	449
10	50	90	130	170	210	250	290	330	370	410	450
11	51	91	131	171	211	251	291	331	371	411	451
12	52	92	132	172	212	252	292	332	372	412	452
13	53	93	133	173	213	253	293	333	373	413	453
14	54	94	134	174	214	254	294	334	374	414	454
~~15~~	55	95	135	175	215	255	295	335	375	415	455
~~16~~	56	96	136	176	216	256	296	336	376	416	456
~~17~~	57	97	137	177	217	257	297	337	377	417	457
18	58	98	138	178	218	258	298	338	378	418	458
19	59	99	139	179	219	259	299	339	379	419	459
~~20~~	60	100	140	180	220	260	300	340	380	420	460
~~21~~	61	101	141	181	221	261	301	341	381	421	461
~~22~~	62	102	142	182	222	262	302	342	382	422	462
23	63	103	143	183	223	263	303	343	383	423	463
24	64	104	144	184	224	264	304	344	384	424	464
25	65	105	145	185	225	265	305	345	385	425	465
26	66	106	146	186	226	266	306	346	386	426	466
27	67	107	147	187	227	267	307	347	387	427	467
28	68	108	148	188	228	268	308	348	388	428	468
29	69	109	149	189	229	269	309	349	389	429	469
30	70	110	150	190	230	270	310	350	390	430	470
31	71	111	151	191	231	271	311	351	391	431	471
~~32~~	72	112	152	192	232	272	312	352	392	432	472
33	73	113	153	193	233	273	313	353	393	433	473
34	74	114	154	194	234	274	314	354	394	434	474
35	75	115	155	195	235	275	315	355	395	435	475
36	76	116	156	196	236	276	316	356	396	436	476
37	77	117	157	197	237	277	317	357	397	437	477
38	78	118	158	198	238	278	318	358	398	438	478
39	79	119	159	199	239	279	319	359	399	439	479
40	80	120	160	200	240	280	320	360	400	440	480

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUED:		EFFECTIVE:
April 1, 1964	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N. Y.	May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1 Original Page 2

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NOTICE

Rates, charges, rules and regulations herein applying between points in the United States on the one hand and points in Africa, Asia and Europe on the other hand were published in tarifff C.A.B. No. 2 issued by World Tariffs Corporation, Agent and are cancelled therein by the following pages: 2nd Revised Page 2, 8th Revised Page 3, 7th Revised Page 5, 11th Revised Page 6, 11th Revised Page 6-A, 14th Revised Page 6-B, 15th Revised Page 7, 3rd Revised Page 8, 1st Revised Page 15, and 1st Revised Page 17.

LIST OF PARTICIPATING CARRIERS

This tariff is issued and filed with the Civil Aeronautics Board by R.C. Lounsbury, Agent for and on behalf of the following Participating Carriers under authority of their powers of attorney which are filed with the Civil Aeronautics Board.

PARTICIPATING CARRIERS	ABBREVIATIONS	POWER OF ATTORNEY NO. C.A.B. NO.
American Airlines,Inc.	AA	16
Delta Air Lines,Inc.	DL	21
Pan American World Airways,Inc	PAA	1

EXPLANATION OF REFERENCE MARKS

- ↓ - Denotes reductions.
- ● - Denotes no change.
- / - Denotes or.
- ↑ - Denotes increases.
- & - Denotes and.
- ■ - Denotes additions.
- x - Denotes cancellation.
- ▲ - Denotes changes which results in neither increases nor reductions.
- ‡ - The rates, charges, rules and regulations and services provided herein have been filed in each country in which filing is required by treaty, convention or agreement entered into between that country and the United States, in accordance with the provisions of the applicable treaty, convention or agreement.

EXPLANATION OF ABBREVIATIONS

AA - American Airlines,Inc.	lb(s) or LB(S) - pound(s)	N.J. - New Jersey
AFB - Air Force Base	Mass. - Massachusetts	N.Y. - New York
C.A.B. - Civil Aeronautics Board	MATS - Military Air Transport Service	Ore. - Oregon
Calif. - California	Min. - Minimum	PAA - Pan American World Airways,Inc.
cu. - cubic	Md. - Maryland	SFO - San Francisco, California
D.C. - District of Columbia	N.E.S. - Not elsewhere specified between the same points	U.S. - United States
Del. - Delaware	Neth. - Netherlands	U.S.A. or USA - United States of America
DL - Delta Air Lines,Inc.	No.(s) or NO.(S) - Number(s)	Wash. - Washington
in. - inch		Wt. or WT. - Weight
Kg.(s) - Kilogram(s)		
LAX - Los Angeles,California		

ISSUED: April 1, 1964

Issued by R. C. LOUNSBURY, AGENT
PAN AMERICAN WORLD AIRWAYS SYSTEM
Pan Am Building, New York 17, N. Y.

EFFECTIVE: May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT
LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

2nd Revised Page 3
(Issued in lieu of 1st Revised Page 3 rejected by the C.A.B.)
Cancels Original Page 3

INDEX OF COMMODITIES - ALPHABETICAL

COMMODITY	ITEM NO(S)
Military Stores/Impedimenta, N.E.S.	1000/1001/2000
Military Stores/Impedimenta; namely, Foot Lockers, Flight Bags, Trunks, Barracks Bags and Carrying Cases.	1002/1003
Military Stores/Impedimenta; namely, Household Goods, Used, Not for Resale. .	1004

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Ankara,Turkey	PAA	5,6,7,9,11
Baltimore,Maryland	PAA	7
Bangkok,Thailand	PAA	9,10
Barcelona,Spain	PAA	5,6,7,9
Beirut,Lebanon	PAA	5,6,7,9
Berlin,Germany	PAA	5,7,9,11
Boston,Mass.	PAA	5,7,11
Bremen,Germany	PAA	5,6,7,9
Brussels,Belgium	PAA	5,6,7,9
Chateauroux,France	PAA	5,6,7,9, X
Chicago,Illinois	AA	12
Cologne,Germany	PAA	5,6,7,9,11
Copenhagen,Denmark	PAA	5,6,7,9
Delhi, India	PAA	10
Detroit,Michigan	AA	12
Djakarta,Indonesia	PAA	9,10
Dover AFB,Delaware	PAA	7
Dusseldorf,Germany	PAA	5,6,7,9,11
Frankfurt,Germany	PAA	5,6,7,9, X,11
Glasgow,Scotland	PAA	5,6,7,9,11
Guam Island	PAA	9,10,11
Hamburg,Germany	PAA	5,6,7,9,11
Hanover,Germany	PAA	5,6,7,9
Honolulu,Hawaii	PAA	10
Istanbul,Turkey	PAA	5,6,7,9,11
Karachi,Pakistan	PAA	5,6,7,9
Lisbon,Portugal	PAA	5,6,7,9
London,England	PAA	5,6,7,9, X,11
Los Angeles,Calif.	PAA	9,11
McGuire AFB,N.J.	PAA	9
Manila,Philippines	PAA	9,10,11,12
Miami,Florida	DL	12
Mildenhall,England	PAA	7,9,10
Munich,Germany	PAA	5,6,7,9,11
New York,New York	PAA	6,9,11,12
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Nuremberg,Germany	PAA	5,6,7,9,11
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Portland,Oregon	PAA	10
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Seattle,Washington	PAA	10
Stockholm,Sweden	PAA	5,6,7,9
Stuttgart,Germany	PAA	5,6,7,9,11
Tampa,Florida	DL	12
Teheran,Iran	PAA	5,6,7,9
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Washington,D.C.	AA	6,10,12

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED:	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N. Y.	EFFECTIVE:
April 30, 1964		May 1, 1964

Issued on not less than 1 days notice under Special Tariff Permission of the Civil Aeronautics Board, C.A.B. No. 18210.

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

Original Page 4

RULES AND REGULATIONS

RULE NO. 1 - APPLICATION OF TARIFF

(A) The rates and charges contained in this tariff apply -

(1) between the points named from airport to airport only,

(2) only on shipments moving for the U.S. Department of Defense.

(B) Carrier does not perform pick-up and delivery service.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED:
April 1, 1964

Issued by R. C. LOUNSBURY, AGENT
PAN AMERICAN WORLD AIRWAYS SYSTEM
Pan Am Building, New York 17, N. Y.

EFFECTIVE:
May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1 Original Page 5

SECTION 1 - LOCAL SPECIFIC COMMODITY RATES VIA PAA

ITEM 1000

Military Stores/Impedimenta,N.E.S., moving on (1) U.S. Government Bills of Lading, (2) Commercial Bills of Lading endorsed to show that such Bills of Lading are to be exchanged for U.S. Government Bills of Lading at destination, (3) Commercial Bills of Lading endorsed "Transportation hereunder is for the U.S. Government and the actual transportation charge(s) paid to PAA by the shipper or receiver is to be reimbursed by the U.S. Government", or (4) Commercial Bills of Lading for the Army and Air Force Exchange Service for which the Army and Air Force Exchange Service pays the charges.

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Baltimore,Md., U.S.A. To sideline points shown	TO Baltimore, Md., U.S.A. From sideline points shown	FROM Boston,Mass., U.S.A. To sideline points shown					TO Boston,Mass., U.S.A. From sideline points shown			
	Min. WT. LBS.	Min. WT. LBS.	Min. WT. LBS.					Min. WT. LBS.			
	10,000	10,000	100	440	660	880	1100	100	660	880	1100
Amsterdam,Netherlands. . .	-	-	34	34	34	34	34	32	32	32	32
Ankara,Turkey.	-	-	69	69	69	69	69	-	-	-	-
Barcelona,Spain.	-	-	45	45	45	43	40	-	-	-	-
Beirut,Lebanon	-	-	74	74	74	74	74	-	-	-	-
Berlin,Germany	-	-	39	39	39	39	39	26	26	26	26
Bremen,Germany	-	-	45	45	45	44	40	45	45	44	40
Brussels,Belgium	-	-	34	34	34	34	34	32	32	32	32
Chateauroux,France	#34	-	#30	#30	#30	#30	#30	#24	#24	#24	#24
Cologne,Germany.	-	-	34	34	34	34	34	26	26	26	26
Copenhagen,Denmark	-	-	39	39	39	39	39	49	47	43	40
Dusseldorf,Germany	-	-	34	34	34	34	34	26	26	26	26
Frankfurt,Germany.	35	-	31	31	31	31	31	25	25	25	25
Glasgow,Scotland	-	-	30	30	30	30	30	25	25	25	25
Hamburg,Germany.	-	-	35	35	35	35	35	26	26	26	26
Hanover,Germany.	-	-	35	35	35	35	35	26	26	26	26
Istanbul,Turkey.	-	-	68	68	68	68	68	-	-	-	-
Karachi,Pakistan	-	-	127	127	127	127	127	-	-	-	-
Lisbon,Portugal.	-	-	44	44	44	41	38	-	-	-	-
London,England	33	-	29	29	29	29	29	23	23	23	23
Munich,Germany	-	-	35	35	35	35	35	26	26	26	26
Nuremberg,Germany.	-	-	34	34	34	34	34	26	26	26	26
Oslo,Norway.	-	-	49	49	49	45	42	-	-	-	-
Paris,France	34	-	30	30	30	30	30	24	24	24	24
Rome,Italy	-	-	48	48	47	44	40	-	-	-	-
Stockholm,Sweden	-	-	57	54	49	45	42	-	-	-	-
Stuttgart,Germany.	-	-	34	34	34	34	34	26	26	26	26
Teheran,Iran	-	-	88	88	88	88	88	-	-	-	-

(Continued on next page)

- Rates expire with October 31,1964.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED: April 1, 1964

Issued by R. C. LOUNSBURY, AGENT
PAN AMERICAN WORLD AIRWAYS SYSTEM
Pan Am Building, New York 17, N. Y.

EFFECTIVE: May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT
LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

2nd Revised Page 6
(Issued in lieu of 1st Revised Page 6 rejected by the C.A.B.)
Cancels Original Page 6

SECTION 1 - LOCAL SPECIFIC COMMODITY RATES VIA PAA

ITEM 1000 (Concluded)

Military Stores/Impedimenta, N.E.S., moving on (1) U.S. Government Bills of Lading, (2) Commercial Bills of Lading endorsed to show that such Bills of Lading are to be exchanged for U.S. Government Bills of Lading at destination, (3) Commercial Bills of Lading endorsed "Transportation hereunder is for the U.S. Government and the actual transportation charge(s) paid to PAA by the shipper or receiver is to be reimbursed by the U.S. Government, or (4) Commercial Bills of Lading for the Army and Air Force Exchange Service for which the Army and Air Force Exchange Service pays the charges.

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM New York,N.Y. U.S.A. To sideline points shown						TO New York,N.Y. U.S.A. From sideline points shown					FROM Washington, D.C.,U.S.A. To sideline points shown	TO Washington, D.C.,U.S.A. From sideline points shown
	Min. Wt. LBS.						Min. WT. LBS.					Min. WT. LBS.	Min. WT. LBS.
	100	440	660	880	1100	16000	100	660	880	1100	16000	10,000	10,000
Amsterdam,Netherlands. . .	34	34	34	34	34	25	32	32	32	32	22	-	-
Ankara,Turkey.	69	69	69	69	69	69	-	-	-	-	-	-	-
Barcelona,Spain.	45	45	45	44	40	40	-	-	-	-	-	-	-
Beirut,Lebanon	74	74	74	74	74	74	-	-	-	-	-	-	-
Berlin,Germany	39	39	39	39	39	27	26	26	26	26	23	-	-
Bremen,Germany	45	45	45	45	45	26	45	45	44	41	22	-	-
Brussels,Belgium	34	34	34	34	34	26	32	32	32	32	22	-	-
Chateauroux,France	#30	#30	#30	#30	#30	#26	#24	#24	#24	#24	#22	#34	-
Cologne,Germany.	34	34	34	34	34	26	26	26	26	26	23	-	-
Copenhagen,Denmark	49	49	47	44	40	40	49	47	44	40	40	-	-
Dusseldorf,Germany	34	34	34	34	34	26	26	26	26	26	22	-	-
Frankfurt,Germany.	31	31	31	31	31	24	25	25	25	25	20	35	-
Glasgow,Scotland	30	30	30	30	30	24	25	25	25	25	21	-	-
Hamburg,Germany.	35	35	35	35	35	27	26	26	26	26	23	-	-
Hanover,Germany.	35	35	35	35	35	27	26	26	26	26	23	-	-
Istanbul,Turkey.	68	68	68	68	68	68	-	-	-	-	-	-	-
Karachi,Pakistan	127	127	127	127	127	127	-	-	-	-	-	-	-
Lisbon,Portugal.	44	44	44	42	39	39	-	-	-	-	-	-	-
London,England	29	29	29	29	29	22	23	23	23	23	18	33	-
Munich,Germany	35	35	35	35	35	28	▲26	26	26	26	24	-	-
Nuremberg,Germany.	34	34	34	34	34	28	26	26	26	26	24	-	-
Oslo,Norway.	49	49	49	46	43	43	-	-	-	-	-	-	-
Paris,France	30	30	30	30	30	23	24	24	24	24	19	34	-
Rome,Italy	48	48	48	44	41	41	-	-	-	-	-	-	-
Stockholm,Sweden	57	54	49	46	43	43	-	-	-	-	-	-	-
Stuttgart,Germany.	34	34	34	34	34	27	26	26	26	26	23	-	-
Teheran,Iran	88	88	88	88	88	88	-	-	-	-	-	-	-

CANCELLED

- Rates expire with October 31,1964.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED:	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N. Y.	EFFECTIVE:
April 30, 1964		May 1, 1964

(Printed in U.S.A.)

CORRECTION NO. 6

Issued on not less than 1 days notice under Special Tariff Permission of the Civil Aeronautics Board, C.A.B. No. 18210.

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

2nd Revised Page 7
(Issued in lieu of 1st Revised Page 7 rejected by the C.A.B.) Cancels
Original Page 7

SECTION 1 - LOCAL SPECIFIC COMMODITY RATES VIA PAA

ITEM 1001

Military Stores/Impedimenta, N.E.S., Moving on U.S. Government Bills of Lading

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Baltimore, Md., U.S.A. To Sideline points shown	TO Baltimore, Md., U.S.A. From Sideline points shown	FROM Boston, Mass., U.S.A To Sideline points shown	TO Boston, Mass., U.S.A. From Sideline points shown	FROM Dover AFB, Del., U.S.A. To Sideline points shown		TO Dover AFB, Del., U.S.A. From Sideline points shown	
	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.		Min.WT.LBS.	
	10,000	10,000	100	100	100	16000	100	16000
Amsterdam, Netherlands. .	-	-	-	-	#31	(1)# 26	#29	(1)# 22
Ankara, Turkey.	-	-	-	-	#69	# 69	-	-
Barcelona, Spain.	-	-	-	-	#49	# 49	-	-
Beirut, Lebanon	-	-	-	-	#74	# 74	-	-
Berlin, Germany	-	-	-	-	-	(1)# 28	#26	(1)# 24
Bremen, Germany	-	-	-	-	#45	(1)# 27	#45	(1)# 23
Brussels, Belgium	-	-	-	-	#31	(1)# 26	#29	(1)# 22
Chateauroux, France . . .	-	-	-	-	B&D#31	(1)# 26	#25	(1)# 22
Cologne, Germany.	-	-	-	-	#31	(1)# 27	#26	(1)# 23
Copenhagen, Denmark . . .	-	-	-	-	#49	# 49	-	-
Dusseldorf, Germany . . .	-	-	-	-	#31	(1)# 27	#26	(1)# 23
Frankfurt, Germany. . . .	-	-	-	-	B&D#32	(1)# 27	#26	(1)# 23
Glasgow, Scotland	-	-	-	-	#30	(1)# 25	#25	(1)# 21
Hamburg, Germany.	-	-	-	-	#32	(1)# 27	#26	(1)# 23
Hanover, Germany.	-	-	-	-	#32	(1)# 27	#26	(1)# 23
Istanbul, Turkey.	-	-	-	-	#68	# 68	-	-
Karachi, Pakistan	-	-	-	-	#127	#127	-	-
Lisbon, Portugal.	-	-	-	-	#44	# 44	-	-
London, England	-	-	-	-	#30	(1)# 25	#24	(1)# 21
Maldenhall, England . . .	#33	-	#29	#23	B&D#30	(1) 25	#24	(1)# 21
Munich, Germany	-	-	-	-	#32	(1)# 28	#26	(1)# 24
Nuremberg, Germany. . . .	-	-	-	-	#31	(1)# 28	#26	(1)# 24
Oslo, Norway.	-	-	-	-	#51	# 51	-	-
Paris, France	-	-	-	-	#31	(1)# 26	#25	(1)# 22
Rome, Italy..	-	-	-	-	#52	# 52	-	-
Stockholm, Sweden	-	-	-	-	#57	# 57	-	-
Stuttgart, Germany. . . .	-	-	-	-	#31	(1)# 28	#26	(1)# 24
Teheran, Iran	-	-	-	-	#88	# 88	-	-

(Continued on Page 9)

- Rates expire with October 31,1964.

Tariff No. CR-3, C.A.B. No. 193 issued by R.C. Lounsbury, Agent. Except as herein provided, charges will be assessed on the actual gross weight of the consignment including the weight of pallets when commodity is shipped on pallets. Fractions of a pound will be charged for at the next higher pound. Charges for consignments with cubic measurement exceeding 172.8 cubic inches per pound will be assessed on the basis of one pound for each 172.8 cubic inches, and fraction of 172.8 cubic inches will be charged for at the next higher pound.

B Cubic measurement of consignment shall be the sum of the individual cubic measurements of each shipping package and each piece shipped loose except that when the commodity is shipped on a pallet, the cubic measurement of the pallet and its contents shall be used in lieu of the individual cubic measurements of the shipping packages and loose pieces on pallet. Cubic measurement of each shipping package, loose piece or pallet (and its contents) is the product of greatest length times greatest width times greatest height of such package, piece or pallet (and its contents).

D When commodity is shipped on pallets, the minimum charge for the commodity shipped on pallets shall be the charge for 5140 pounds times the number of pallets in the consignment.

(1) Rate will only apply on a shipment between Dover AFB,Del., U.S.A. and the sideline point transported by PAA via highway motor truck between Dover AFB,Del., U.S.A. and New York,N.Y., U.S.A. and transported by PAA via aircraft between New York,N.Y., U.S.A. and the sideline point.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED: April 30, 1964

Issued by R. C. LOUNSBURY, AGENT
PAN AMERICAN WORLD AIRWAYS SYSTEM
Pan Am Building, New York 17, N.Y.

EFFECTIVE: May 1, 1964

CORRECTION NO. 7

(Printed in U.S.A.)

Issued on not less than 1 days notice under Special Tariff Permission of the Civil Aeronautics Board, C.A.B. No. 18210.

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

Original Page 8

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For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED: April 1, 1964	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N. Y.	EFFECTIVE: May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1 — Original Page 9

SECTION 1 - LOCAL SPECIFIC COMMODITY RATES VIA PAA

ITEM 1001 (Continued)

Military Stores/Impedimenta,N.E.S., moving on U.S. Government Bills of Lading

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Los Angeles, Calif.,U.S.A. To sideline points shown	TO Los Angeles, Calif.,U.S.A. From sideline points shown	FROM McGuire AFB, N.J., U.S.A. To sideline points shown		TO McGuire AFB, N.J., U.S.A. From sideline points shown		FROM New York, N.Y.,U.S.A. To sideline points shown		TO New York, N.Y.,U.S.A. From sideline points shown	
	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.		Min.WT.LBS.		Min.WT.LBS.		Min.WT.LBS.	
	2,200	2,200	100	16000	100	16000	100	16000	100	16000
Amsterdam,Netherlands.	-	-	#31	(1)# 25	#29	(1)# 22	-	-	-	-
Ankara,Turkey.	-	-	#69	# 69	-	-	-	-	-	-
Bangkok,Thailand . . .	106	-	-	-	-	-	-	-	-	-
Barcelona,Spain. . . .	-	-	#49	# 49	-	-	-	-	-	-
Beirut,Lebanon	-	-	#74	# 74	-	-	-	-	-	-
Berlin,Germany	-	-	-	(1)# 27	#26	(1)# 23	-	-	-	-
Bremen,Germany	-	-	#45	(1)# 26	#45	(1)# 22	-	-	-	-
Brussels,Belgium . . .	-	-	#31	(1)# 26	#29	(1)# 22	-	-	-	-
Chateauroux,France . .	-	-	B&D#30	(1)# 25	#24	(1)# 22	-	-	-	-
Cologne,Germany. . . .	-	-	#31	(1)# 26	#26	(1)# 23	-	-	-	-
Copenhagen,Denmark . .	-	-	#49	# 49	-	-	-	-	-	-
Djakarta,Indonesia . .	106	-	-	-	-	-	-	-	-	-
Dusseldorf,Germany . .	-	-	#31	(1)# 26	#26	(1)# 22	-	-	-	-
Frankfurt,Germany. . .	-	-	B&D#31	(1)# 27	#25	(1)# 23	-	-	-	-
Glasgow,Scotland . . .	-	-	#30	(1)# 24	#25	(1)# 21	-	-	-	-
Guam Island.	79	-	-	-	-	-	-	-	-	-
Hamburg,Germany. . . .	-	-	#32	(1)# 27	#26	(1)# 23	-	-	-	-
Hanover,Germany. . . .	-	-	#32	(1)# 27	#26	(1)# 23	-	-	-	-
Istanbul,Turkey. . . .	-	-	#68	# 68	-	-	-	-	-	-
Karachi,Pakistan . . .	-	-	#127	#127	-	-	-	-	-	-
Lisbon,Portugal. . . .	-	-	#44	# 44	-	-	-	-	-	-
London,England	-	-	#29	(1)# 24	#23	(1)# 21	-	-	-	-
Manila,Philippines . .	79	-	-	-	-	-	-	-	-	-
Mildenhall,England . .	-	-	B&D#29	(1)# 24	#23	(1)# 21	#29	#24	#23	#21
Munich,Germany	-	-	#32	(1)# 28	#26	(1)# 24	-	-	-	-
Nuremberg,Germany. . .	-	-	#31	(1)# 28	#26	(1)# 24	-	-	-	-
Oslo,Norway.	-	-	#51	# 51	-	-	-	-	-	-
Paris,France	-	-	#30	(1)# 25	#24	(1)# 22	-	-	-	-
Rome,Italy	-	-	#52	# 52	-	-	-	-	-	-
Saigon,Vietnam	87	-	-	-	-	-	-	-	-	-
Stockholm,Sweden . . .	-	-	#57	# 57	-	-	-	-	-	-
Stuttgart,Germany. . .	-	-	#31	(1)# 27	#26	(1)# 23	-	-	-	-
Teheran,Iran	-	-	#88	# 88	-	-	-	-	-	-
Tokyo,Japan.	75	75	-	-	-	-	-	-	-	-
Wake Island.	77	-	-	-	-	-	-	-	-	-

(Continued on next page)

\# - Rates expire with October 31,1964.

B - Rates are not subject to Rule No. 4(L)(1) of Local and Joint Air Cargo Tariff No. CR-3, C.A.B. No. 193 issued by R.C.Lounsbury,Agent. Except as herein provided, charges will be assessed on the actual gross weight of the consignment including the weight of pallets when commodity is shipped on pallets. Fractions of a pound will be charged for at the next higher pound. Charges for consignments with cubic measurements exceeding 172.8 cubic inches per pound will be assessed on the basis of one pound for each 172.8 cubic inches, and fraction of 172.8 cubic inches will be charged for at the next higher pound.

Cubic measurement of consignment shall be the sum of the individual cubic measurements of each shipping package and each piece shipped loose except that when the commodity is shipped on a pallet, the cubic measurement of the pallet and its contents shall be used in lieu of the individual cubic measurements of the shipping packages and loose pieces on pallet. Cubic measurement of each shipping package, loose piece or pallet (and its contents) is the product of greatest length times greatest width times greatest height of such package,piece or pallet (and its contents).

D - When commodity is shipped on pallets, the minimum charge for the commodity shipped on pallets shall be the charge for 5140 pounds times the number of pallets in the consignment.

(1) - Rate will only apply on a shipment between McGuire AFB,N.J.,U.S.A. and the sideline point transported by PAA via highway motor truck between McGuire AFB,N.J., U.S.A. and New York,N.Y., U.S.A. and transported by PAA via aircraft between New York,N.Y.. U.S.A. and the sideline point.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED:	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N.Y.	EFFECTIVE:
April 1, 1964		May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT
LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

2nd Revised Page 10
(Issued in lieu of 1st Revised Page 10 rejected by the C.A.B.) Cancels
Original Page 10

SECTION 1 - LOCAL SPECIFIC COMMODITY RATES VIA PAA

ITEM 1001 (Concluded)

Military Stores/Impedimenta, N.E.S., moving on U.S. Government Bills of Lading

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Portland Ore.,U.S.A. To sideline points shown	TO Portland Ore.,U.S.A. From sideline points shown	FROM San Francisco, Calif., U.S.A. To sideline points shown				TO San Francisco, Calif.,U.S.A. From sideline points shown			
	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.				Min.WT.LBS.			
	2,200	2,200	100	1000	•5140	16000	100	1000	•5140	16000
Bangkok,Thailand	106	-	-	110	C100	-	-	110	C100	-
Delhi, India	-	-	103	-	-	-	103	-	-	-
Djakarta,Indonesia	106	-	-	117	C106	-	-	-	-.	-
Guam Island	79	-	-	93	C 84	-	-	93	C 84	-
Honolulu,Hawaii,U.S.A.	-	-	-	28	C 26	-	-	-	A 11	-
Manila,Philippines	79	-	-	93	C 84	-	-	-	-	-
	-	-		-	-	-		-	-	-
Saigon,Vietnam	87	-	-	104	-	56	-	104	-	40
Tokyo,Japan	75	75	-	64	-	37	-	64	-	26
Wake Island	77	-	-	93	C 84	-	-	-	-	-

SIDELINE POINTS	FROM Seattle, Wash.,U.S.A. To sideline points shown	TO Seattle, Wash.,U.S.A. From sideline points shown	FROM Travis AFB, Calif.,U.S.A. To sideline points shown			TO Travis AFB, Calif.,U.S.A. From sideline points shown			FROM Washington, D.C.,U.S.A. To sideline points shown	TO Washington, D.C.,U.S.A. From sideline points shown
	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.			Min.WT.LBS.			Min.WT.LBS.	Min.WT.LBS.
	2,200	2,200	1000	•5140	16000	1000	•5140	16000	10,000	10,000
Bangkok,Thailand X	106	-	ø110	øC100	-	ø110	øC100	-	-	-
Djakarta,Indonesia X	106	-	-	-	-	-	-	-	-	-
Guam Island	79	-	ø 93	øC 84	-	ø 93	øC84	-	-	-
Honolulu,Hawaii,U.S.A. X	-	-	ø 28	øC 26	-	-	øA11	-	-	-
Manila,Philippines	79	-	-	-	-	-	-	-	-	-
Maldenhall,England X	-	-	-	-	-	-	-	-	#33	-
Saigon,Vietnam	87	-	ø104	-	56	ø104	-	40	-	-
Tokyo,Japan	75	75	ø64	-	37	ø64	-	26	-	-
Wake Island	77	-	-	-	-	-	-	-	-	-

ø - Rates expire with June 30,1964.

• - Except as noted.

A - Applicable to shipments of 2200 lbs. and over.

- Rates expire with October 31,1964.

C - When commodity is shipped on pallets, the minimum charge for the commodity shipped on pallets shall be the charge for 5140 pounds times the number of pallets in the consignment.

CANCELLED

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED:	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N. Y.	EFFECTIVE:
April 20, 1964		May 1, 1964

CORRECTION NO. 8

(Printed in U.S.A.)

Issued on not less than 1 days notice under Special Tariff Permission of the Civil Aeronautics Board, C.A.B. No. 18210.

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R. C. LOUNSBURY, AGENT Original Page 11

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1

SECTION 1 - LOCAL SPECIFIC COMMODITY RATES VIA PAA

ITEM 1002

Military Stores/Impedimenta; namely, Foot Lockers, Flight Bags, Trunks, Barracks Bags and Carrying Cases, moving on (1) U.S. Government Bills of Lading, (2) Commercial Bills of Lading endorsed to show that such Bills of Lading are to be exchanged for U.S. Government Bills of Lading at destination, or (3) Commercial Bills of Lading endorsed "Transportation hereunder is for the U.S. Government and the actual transportation charge(s) paid to PAA by the shipper or receiver is to be reimbursed by the U.S. Government".

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Boston,Mass.,U.S.A. To sideline points shown	TO Boston,Mass.,U.S.A. From sideline points shown	FROM New York,N.Y.,U.S.A. To sideline points shown	TO New York,N.Y., U.S.A. From sideline points shown
	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.
	100	100	100	100
Berlin,Germany	26	-	26	-
Cologne,Germany	26	-	26	-
Dusseldorf,Germany	26	-	26	-
Frankfurt,Germany	26	-	26	-
Glasgow,Scotland	25	-	25	-
Hamburg,Germany	26	-	26	-
London,England	25	-	25	-
Munich,Germany	26	-	26	-
Nice,France	26	-	26	-
Nuremberg,Germany	26	-	26	-
Paris,France	26	-	26	-
Rome,Italy	-	-	29	29
Stuttgart,Germany	26	-	26	-

ITEM 1003

Military Stores/Impedimenta; namely, Foot Lockers, Flight Bags, Trunks, Barracks Bags and Carrying Cases; moving on U.S. Government Bills of Lading

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Los Angeles, Calif.,U.S.A. To sideline points shown	TO Los Angeles, Calif.,U.S.A. From sideline points shown	FROM New York, N.Y.,U.S.A. To sideline points shown	TO New York, N.Y.,U.S.A. From sideline points shown	FROM San Francisco, Calif.,U.S.A. To sideline points shown	TO San Francisco, Calif.,U.S.A. From sideline points shown
	Min.Wt.LBS.	Min.WT.LBS.	Min.Wt.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.
	100	100	100	100	100	100
Ankara,Turkey	-	-	45	45	-	-
Guam Island	-	30	-	-	-	30
Istanbul,Turkey	-	-	43	43	-	-
Manila,Philippines	-	30	-	-	-	30
Tokyo,Japan	-	30	-	-	-	30

ITEM 1004

Military Stores/Impedimenta; namely, Household Goods, Used, Not for Resale, moving on U.S. Government Bills of Lading

RATES IN U.S. CENTS PER POUND

SIDELINE POINTS	FROM Guam Island To sideline points shown	TO Guam Island From sideline points shown	FROM Manila, Philippines To sideline points shown	TO Manila, Philippines From sideline points shown	FROM Tokyo, Japan To sideline points shown	TO Tokyo, Japan From sideline points shown
	Min.Wt.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.	Min.WT.LBS.
	100	100	100	100	100	100
Los Angeles,Calif,USA	30	-	30	-	30	-
San Francisco,Calif,USA	30	-	30	-	30	-

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED: April 1, 1964

Issued by R. C. LOUNSBURY, AGENT
PAN AMERICAN WORLD AIRWAYS SYSTEM
Pan Am Building, New York 17, N. Y.

EFFECTIVE: May 1, 1964

(Printed in U.S.A.)

R. C. LOUNSBURY, AGENT

LOCAL AND JOINT MILITARY AIR CARGO TARIFF NO. M-SC-1 Original Page 12

SECTION 2 - JOINT SPECIFIC COMMODITY RATES

ITEM 2000

Military Stores/Impedimenta, N.E.S., moving on U.S. Government Bills of Lading, Minimum Weight 2200 Lbs.

RATES IN U.S. CENTS

SIDELINE POINTS	FROM Manila, Philippines To sideline points shown	TO Manila, Philippines From sideline points shown	FROM Tokyo, Japan To sideline points shown	TO Tokyo, Japan From sideline points shown	ROUTE NO.
	PER LB.	PER LB.	PER LB.	PER LB.	
Atlanta,Georgia,U.S.A. . . .	98	98	94	94	2
Chicago,Illinois,U.S.A. . . .	87	89	83	85	1
Detroit,Michigan,U.S.A. . . .	88	90	84	86	1
Miami,Florida,U.S.A.	103	105	99	101	2
New York,New York,U.S.A. . .	90	92	86	88	1
Tampa,Florida,U.S.A.	99	101	95	97	2
Washington,D.C.,U.S.A. . . .	89	91	85	87	1

EXPLANATION OF ROUTING NUMBERS

Routings are shown from headline points to sideline points and for routings from sideline points to headline points the routings should be read in the reverse order.

Route No.	Routing	Route No.	Routing
1	PAA-LAX/SFO-AA	2	PAA-LAX/SFO-DL

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 2.

ISSUED: April 1, 1964	Issued by R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM Pan Am Building, New York 17, N. Y.	EFFECTIVE: May 1, 1964

(Printed in U.S.A.)

A. T. B. No. 125
Cancels
A.T.B. No. 112, A.T.B. No. 114,
and A.T.B. No. 117

JAN - 2 1963

C. A. B. No. 259
Cancels
C.A.B. No. 227, C.A.B. No. 234,
and C.A.B. No. 235

1st Revised Title Page
Cancels Original Title Page

R .C. LOUNSBURY, AGENT

LOCAL AND JOINT AIR CARGO TARIFF No. C-AP-9

Cancelling Local and Joint U. S. Trans-Atlantic Air Cargo Tariff No. 2, C.A.B. No. 227
Cancelling Local and Joint U. S. Trans-Pacific Air Cargo Rates Tariff No. 2, C.A.B. No. 234
Cancelling Local and Joint Canadian Trans-Atlantic Air Cargo Rates Tariff No. 3, A.T.B. No. 112
Cancelling Local and Joint Canadian Trans-Pacific Air Cargo Rates Tariff No. 3, A.T.B. No. 117
and
Cancelling Local and Joint Air Cargo Rates Tariff No. 4, C.A.B. No. 235, A.T.B. No. 114

NAMING

ATLANTIC AND PACIFIC GENERAL

▲ COMMODITY RATES AND CHARGES

AND

■SPECIFIC COMMODITY RATES AND CHARGES

(stated in percentages of general commodity rates)

APPLICABLE
BETWEEN POINTS IN
NORTH AMERICA
AND POINTS IN
AFRICA, ASIA, AUSTRALASIA, EUROPE AND ISLANDS IN THE ATLANTIC AND PACIFIC OCEANS
ALSO
BETWEEN POINTS IN ASIA AND AUSTRALASIA AND ISLANDS IN THE PACIFIC OCEAN

The points named herein are in alphabetical order in the Rate Tables.

This tariff is governed, except as otherwise provided herein, by Local and Joint Air Cargo Tariff No. CR-3, C.A.B. No. 193, A.T.B. No. 94, issued by R. C. Lounsbury, Agent, including supplements thereto and successive issues thereof.

For explanations of abbreviations, reference marks and symbols used but not explained hereon, see Page 5.

Departure from the terms of Section 221.51 of its Economic Regulations authorized by the Civil Aeronautics Board of the United States of America (938).

Departure from the terms of Section 8.8.1, Part II of Rule No. 1/52 of the Air Transport Board is authorized by Special Permission No. 2804, dated January 16, 1956 of the Air Transport Board of Canada.

The rates, charges, rules, regulations, and services provided herein have been filed in each country in which filing is required by treaty, convention, or agreement entered into between that country and the United States and/or Canada, in accordance with the provisions of the applicable treaty, convention, or agreement.

ISSUED:	Issued by	EFFECTIVE:
AUGUST 2, 1961	R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM 28-19 Bridge Plaza North Long Island City 1, N. Y.	SEPTEMBER 1, 1961 (Original Tariff effective April 1, 1956)

(Printed in U.S.A.)

CORRECTION NO. 613

ALL RATES HEREON ARE INCREASES UNLESS OTHERWISE INDICATED.

A.T.B. NO. 125 ■TABLE 58 ¶C.A.B. NO. 259

R. C. LOUNSBURY, AGENT

Local and Joint Air Cargo Tariff No. C-AP-9

9TH REVISED PAGE 34-B
CANCELS 8TH REVISED PAGE 34-B

GENERAL COMMODITY RATES IN U.S.CENTS PER KG. BETWEEN POINTS IN AREA NO 1 AND 3, VIA ROUTE NO 1 OR 2

SIDELINE CITY	FROM SAN FRANCISCO, CALIFORNIA TO SIDELINE CITY — MINIMUM WEIGHT IN KILOGRAMS						UNDER 45 KG	TO SAN FRANCISCO, CALIFORNIA FROM SIDELINE CITY — MINIMUM WEIGHT IN KILOGRAMS							UNDER 45 KG
	500	■400	■300	■200	100	45		1000	500	■400	■300	■200	100	45	
AUCKLAND NEW ZEALAND	353	353	353	353	353	●353	● 470	353	353	353	353	353	353	●353	● 470
BANGALORE INDIA	387	397	405	415	437	485	634	311	311	321	328	338	358	427	560
BANGKOK THAILAND	288	291	295	330	358	♦366	♦ 495	273	288	291	295	330	358	♦366	♦ 495
BIAK N E I	310	322	342	377	405	438	589	295	310	322	342	377	405	438	589
BOMBAY INDIA	354	365	373	383	404	452	610	281	281	291	298	308	328	399	528
CALCUTTA INDIA	337	349	353	388	416	424	572	299	299	309	317	327	347	415	550
CHITTAGONG PAKISTAN	336	339	343	378	406	414	552	311	311	321	328	338	358	414	552
COLOMBO CEYLON	369	377	381	408	429	452	610	307	307	317	325	335	355	423	560
DACCA PAKISTAN	334	346	351	386	414	422	569	299	299	309	317	327	347	415	550
DELHI INDIA	357	367	375	385	407	457	617	281	281	291	298	308	328	399	528
DJAKARTA INDONESIA	288	291	295	330	358	366	495	288	288	291	295	330	358	366	495
GUAM ISLAND	●229	●295	●295	●295	●324	●348	●463	●214	●229	●295	●295	●295	●324	●348	●463
HONG KONG	229	241	261	296	♦324	♦357	♦481	214	229	241	261	296	♦324	♦357	♦481
HYDERABAD INDIA	376	387	395	405	426	474	632	303	303	313	320	330	350	421	550
KABUL AFGHANISTAN	301	312	320	330	351	415	563	311	311	321	329	339	359	423	563
KANDAHAR AFGHANISTAN	290	300	308	318	339	403	547	299	299	309	317	327	347	411	547
KARACHI PAKISTAN	332	342	350	360	382	446	604	281	281	291	298	308	328	399	528
KUALA LUMPUR MALAYA	288	296	304	339	367	376	♦508	288	288	296	304	339	367	376	♦508
LAHORE PAKISTAN	367	377	385	395	416	471	634	294	294	305	312	322	342	412	545
MADRAS INDIA	353	365	369	404	426	440	623	299	299	309	317	327	347	415	♦550
MANILA PHILIPPINE R	229	241	261	296	324	♦357	♦481	214	229	241	261	296	324	♦357	♦481
MEDAN INDONESIA	288	291	295	330	358	♦366	♦ 495	288	288	291	295	330	358	♦366	♦ 495
MELBOURNE AUSTRALIA	399	399	399	399	399	●399	● 531	399	399	399	399	399	399	●399	● 531
NAGPUR INDIA	370	381	386	406	427	457	605	304	304	314	322	332	352	422	551
NANDI FIJI ISLANDS	297	297	297	297	297	●297	● 396	297	297	297	297	297	297	●297	● 396
NOUMEA NEW CALECONIA	338	338	338	338	338	●338	● 450	338	338	338	338	338	338	●338	● 450
PALEMBANG INDONESIA	288	291	295	330	358	♦366	♦ 495	288	288	291	295	330	358	♦366	♦ 495
PAPEETE TAHITI	282	282	282	282	282	●282	● 376	282	282	282	282	282	282	●282	● 376
ESHAWAR PAKISTAN	390	400	408	418	440	504	662	338	338	349	356	366	386	456	585
OM PENH CAMBODIA	262	270	278	313	341	♦374	♦498	262	262	270	278	313	341	♦374	♦498
RANGOON BURMA	308	311	315	350	♦378	♦386	♦ 522	293	308	311	315	349	♦369	♦386	♦ 522
RAWALPINDI PAKISTAN	378	389	397	407	428	492	650	327	327	337	345	355	375	445	574
SAIGON VIETNAM	247	255	263	298	326	♦359	♦ 483	247	247	255	263	298	♦326	♦359	♦ 483
SEOUL KOREA	229	241	261	296	324	357	481	214	229	241	261	296	324	357	481
SINGAPORE MALAYA	288	291	295	330	358	366	495	288	288	291	295	330	358	366	495
■SUVA FIJI ISLANDS	325	325	325	325	325	325	424	325	325	325	325	325	325	325	424
SYDNEY AUSTRALIA	383	383	383	383	383	●383	● 510	383	383	383	383	383	383	●383	● 510
TAFUNA SAMOA	330	330	330	330	330	●330	● 440	330	330	330	330	330	330	●330	● 440
TAIPEI FORMOSA	229	241	261	296	324	♦357	♦481	214	229	241	261	296	324	♦357	♦481
TOKYO JAPAN	♦220	230	250	♦285	♦315	♦348	♦472	♦205	♦220	230	250	285	♦315	♦348	♦472
VIENTIANE LAOS	325	330	334	369	397	405	♦ 534	310	325	330	334	369	392	405	♦ 534
WAKE ISLAND	●206	●246	●246	●246	●268	●268	●357	●206	●206	●246	●246	●246	●268	●268	●357
■WELLINGTON N Z	376	376	376	376	376	376	494	376	376	376	376	376	376	376	494

For rates between points in Area Nos. 1 and 3 in effect prior to the effective date hereof, see Table VIII on pages 10-T through 73. For rates formerly shown hereon in Table VIII between points in Area Nos. 1 and 3, see Tables 8 through 67 All rates not so brought forward are herewith cancelled.

explanation of abbreviations, reference marks, or symbols used but not explained hereon, see Page 5(as amended)

ISSUED	Issued by:	EFFECTIVE
MARCH 2, 1963	R. C. LOUNSBURY, AGENT PAN AMERICAN WORLD AIRWAYS SYSTEM 28-19 Bridge Plaza North, Long Island City 1, N. Y.	APRIL 1, 1963

(Printed in U. S. A.)

CORRECTION NO. 1516*

R. C. LOUNSBURY, AGENT
Local and Joint Air Cargo Tariff No. C-AP-9

1st Revised Page 76
(Issued in lieu of Original Page 76 rejected by C.A.B. and A.T.B.)

RATE CONVERSION TABLE

When the rates in cents per Kilo named in this tariff are as shown in Column ① below the equivalent rate in cents per pound will be as shown opposite thereto in Column ② below.

①	②	①	②	①	②	①	②	①	②	①	②	①	②	①	②	①	②	①	②	①	②
1	½	51	23	101	46	151	68	201	91	251	114	301	137	351	159	401	182	451	205	501	227
2	1	52	24	102	46	152	69	202	92	252	114	302	137	352	160	402	182	452	205	502	228
3	1	53	24	103	47	153	69	203	92	253	115	303	137	353	160	403	183	453	205	503	228
4	2	⊗ 54	⊗ 24	104	47	154	70	204	93	254	115	304	138	354	161	404	183	454	206	504	229
5	2	⊗ 55	⊗ 25	105	48	155	70	205	93	255	116	305	138	355	161	405	184	455	206	505	229
6	3	56	25	106	48	156	71	206	93	256	116	306	139	356	161	406	184	456	207	506	230
7	3	57	26	107	49	157	71	207	94	257	117	307	139	357	162	407	185	457	207	507	230
8	4	58	26	108	49	158	72	208	94	258	117	308	140	358	162	408	185	458	208	508	230
9	4	⊗ 59	⊗ 27	109	49	159	72	209	95	259	117	309	140	359	163	409	186	459	208	509	231
10	5	⊗ 60	⊗ 27	110	50	160	73	210	95	260	118	310	141	360	163	410	186	460	209	510	231
11	5	61	28	111	50	161	73	211	96	261	118	311	141	361	164	411	186	461	209	511	232
12	5	62	28	112	51	162	73	212	96	262	119	312	142	362	164	412	187	462	210	512	232
13	6	63	29	113	51	163	74	213	97	263	119	313	142	363	165	413	187	463	210	513	233
14	6	⊗	⊗	114	52	164	74	214	97	264	120	314	142	364	165	414	188	464	210	514	233
15	7	64	29	115	52	165	75	215	98	265	120	315	143	365	166	415	188	465	211	515	234
16	7	65 66	29 30	116	53	166	75	216	98	266	121	316	143	366	166	416	189	466	211	516	234
17	8	67	30	117	53	167	76	217	98	267	121	317	144	367	166	417	189	467	212	517	235
18	8	68	31	118	54	168	76	218	99	268	122	318	144	368	167	418	190	468	212	518	235
19	9	69	31	119	54	169	77	219	99	269	122	319	145	369	167	419	190	469	213	519	235
20	9	70	32	120	54	170	77	220	100	270	122	320	145	370	168	420	191	470	213	520	236
21	10	71	32	121	55	171	78	221	100	271	123	321	146	371	168	421	191	471	214	521	236
22	10	72	33	122	55	172	78	222	101	272	123	322	146	372	169	422	191	472	214	522	237
23	10	73	33	123	56	173	78	223	101	273	124	323	147	373	169	423	192	473	215	523	237
24	11	74	34	124	56	174	79	224	102	274	124	324	147	374	170	424	192	474	215	524	238
25	11	75	34	125	57	175	79	225	102	275	125	325	147	375	170	425	193	475	215	525	238
26	12	76	34	126	57	176	80	226	103	276	125	326	148	376	171	426	193	476	216	526	239
27	12	⊗ 77	⊗ 35	127	58	177	80	227	103	277	126	327	148	377	171	427	194	477	216	527	239
28	13	78	35	128	58	178	81	228	103	278	126	328	149	378	171	428	194	478	217	528	239
29	13	79	36	129	59	179	81	229	104	279	127	329	149	379	172	429	195	479	217	529	240
30	14	80	36	130	59	180	82	230	104	280	127	330	150	380	172	430	195	480	218	530	240
31	14	81	37	131	59	181	82	231	105	281	127	331	150	381	173	431	196	481	218	531	241
32	15	82	37	132	60	182	83	232	105	282	128	332	151	382	173	432	196	482	219	532	241
33	15	⊗ 83	⊗ 38	133	60	183	83	233	106	283	128	333	151	383	174	433	196	483	219	533	242
34	15	84	38	134	61	184	83	234	106	284	129	334	152	384	174	434	197	484	220	534	242
35	16	85	39	135	61	185	84	235	107	285	129	335	152	385	175	435	197	485	220	535	243
36	16	86	39	136	62	186	84	236	107	286	130	336	152	386	175	436	198	486	220	536	243
37	17	⊗ 87	⊗ 39	137	62	187	85	237	108	287	130	337	153	387	176	437	198	487	221	537	244
38	17	88	40	138	63	188	85	238	108	288	131	338	153	388	176	438	199	488	221	538	244
39	18	89	40	139	63	189	86	239	108	289	131	339	154	389	176	439	199	489	222	539	244
40	18	90	41	140	64	190	86	240	109	290	132	340	154	390	177	440	200	490	222	540	245
⊗	⊗																				
41	19	91	41	141	64	191	87	241	109	291	132	341	155	391	177	441	200	491	223	541	245
42	19	92	42	142	64	192	87	242	110	292	132	342	155	392	178	442	200	492	223	542	246
43	20	93	42	143	65	193	88	243	110	293	133	343	156	393	178	443	201	493	224	543	246
44	20	⊗ 94	⊗ 43	144	65	194	88	244	111	294	133	344	156	394	179	444	201	494	224	544	247
⊗	⊗																				
45	20	95	43	145	66	195	88	245	111	295	134	345	156	395	179	445	202	495	225	545	247
46	21	96	44	146	66	196	89	246	112	296	134	346	157	396	180	446	202	496	225	546	248
47	21	97	44	147	67	197	89	247	112	297	135	347	157	397	180	447	203	497	225	547	248
48	22	98	44	148	67	198	90	248	112	298	135	348	158	398	181	448	203	498	226	548	249
⊗	⊗																				
49	22	99	45	149	68	199	90	249	113	299	136	349	158	399	181	449	204	499	226	549	249
50	23	100	45	150	68	200	91	250	113	300	136	350	159	400	181	450	204	500	227	550	249
⊗	⊗																				

(Continued)

■For provisions not formerly shown hereon, see Original Page 36-B.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 5.

ISSUED: October 16, 1961

Issued by R. C. LOUNSBURY, AGENT
PAN AMERICAN WORLD AIRWAYS SYSTEM
Pan Am Building, New York 17, N.Y.

EFFECTIVE: November 15, 1961

CORRECTION NO. 767

Printed in U.S.A.

18 BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 15195

In the Matter of Rates of

PAN AMERICAN WORLD AIRWAYS, INC.,

for Military Stores/Impedimenta, N.E.S., moving on U. S. Government Bills of Lading

Complaint of The Flying Tiger Line Inc.

The Flying Tiger Line Inc. (FTL), through its undersigned attorney, proceeding pursuant to Rule 505 of the Rules of Practice, files herewith its Complant against the:

Local Specific Commodity Rates Via Pan American World Airways, Inc.—Item 1001—Military Stores/Impedimenta, N.E.S., moving on U. S. Government Bills of Lading

published by World Tariffs Corporation, Agent,* as providing on their face rates, and a classification, and a practice affecting such rates, which are unjustly discriminatory, and Complainant respectfully requests the Board to order Pan American to discontinue "charging, collecting or receiving any such discriminatory . . . rate or enforcing any such discriminatory . . . classification" pursuant to Section 1002(f) of the Federal Aviation Act of 1958, as amended (the Act). The "removal of discrimination in foreign air transportation" is specifically required by the Act.

In support of its Complaint, Flying Tigers represents as follows:

1) Flying Tigers, a certificated air carrier of property and mail over domestic Route 100, has, and for many years

* Local and Joint Military Air Cargo Tariff No. C-MS-1, C.A.B. No. 2.

past has had, firm contracts for the movement of planeloads of air cargo for the Military Air Transport Service (MATS) at rates at the minima prescribed by the Civil Aeronautics Board, rates which are substantially undercut by the "impedimenta rates" of Pan American World Airways, Inc. (PAA) here complained against. Flying Tigers is a sometime shipper of transpacific airfreight of the kind and character of cargo and equipment moved by PAA for the U. S. government under the low impedimenta tariff, but shipments by Flying Tigers are governed by civilian tariffs at substantially higher rates. Because of this and otherwise (e.g., meaning of "person"), Flying Tigers is a person who may file this Complaint (Act, sec. 1002(a)).

2) The tariff complained of shows on its face that it is availably solely to the United States government as a shipper—for "military stores/impedimenta N.E.S.," and such only if "moving on U. S. government Bills of Lading." This is a classification of shipper and not of commodity.

3) Unlike the statutes regulating surface carriage which make specific provision for special rates for the United States government (Interstate Commerce Act, Sec. 22; Sec. 317(b)) the Federal Aviation Act provides no such dispensation for rates solely for the government as a shipper.

4) Like the statutes regulating surface carriage, the Federal Aviation Act makes unjustly discriminatory 1) a special, low rate for 2) a classification which is governmental only, 3) such classification being part of a program to provide competitive lift for the government; rates of this nature have clearly been proscribed, prohibited and condemned by the Congress. It is incumbent upon the Board, alerted to this, to take summary action to enforce the Congressional intent unambiguously set forth in the statutes, and reinforced by legislative history.

5) *Rate making provision of the Act.* Section 1002(f) of the Act provides that the Board, upon a finding of "unjust discrimination" in a rate, classification, rule, regulation or practice in foreign air transportation, shall order an air carrier to discontinue any such discriminatory rate, classification, rule, regulation or practice.* This procedural provision of the Act relates to discrimination as defined by section 404(b) of the Act; because of its crucial import, that provision is set out in full here:

> "*No air carrier* or foreign air carrier *shall* make, give, or cause any undue or unreasonable preference or advantage to any particular person, fact, locality or description of traffic in air transportation in any respect whatsoever or *subject any particular person,* port, locality or *description of traffic in air transportation to any unjust discrimination* or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Underlining supplied.)

We are here concerned with unjust discrimination—not "undue and unreasonable" prejudice or preference.

6. *The source of "unjust discrimination."* Section 404 (b), set forth above, was first enacted in the Civil Aeronautics Act of 1938. It is practically a verbatim lifting of Section 316 of the Motor Carrier Act first enacted in 1935 and applying to motor carriers. The motor carrier provision, in turn, is a composite of Sections 2 and 3 of the Interstate Commerce Act, enacted as early as 1887, relating to railroads. Section 2 covers "unjust discrimination" and declares *any* unjust discrimination unlawful. Section 3 relates to and defines "preferences and prejudices" and makes *undue* preference and *unreasonable* prejudice unlawful. Basically Section 2 provides:

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* In domestic air transportation the Board shall determine and prescribe a lawful rate, etc. Sec. 1002(d).

> "If any common carrier . . . shall . . . charge any person . . . less compensation for any service rendered . . . in the transportation of . . . property . . . than it charges . . . any other person or persons for doing for him or them a like and contemporaneous service of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

In Appendix A hereof the complete comparable provisions for rail, motor and air carrier are set forth in parallel columns.

7) *The rule of construction for "unjust discrimination" in Section 404(b).* It is a settled rule of construction that when a statutory provision is modeled on the same provision in a pre-existing statute, the construction accorded the earlier statute applies fully to the latter. The rule, in fact, has been established in connection with the very statutory provision in issue here. According to the Supreme Court of the United States:*

21 > "It is not open to question that the provisions of § 2 of the act to regulate commerce were substantially taken from § 90 of the English railway clauses consolidation act of 1845, known as the "equality clause" . . . And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us."

Certainly if the settled meaning of the English equality clause applied in construing Section 2 of the Interstate

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* *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U.S. 235, 253, 55 L. ed. 448, 457 (1911).

Commerce Act, the settled meaning of that Section 2 governs in construing its counterpart in the Federal Aviation Act—Section 404(b).

8) *Ownership of goods as criterion for tariff rates in unjust discrimination.* The very legal proposition posed by the PAA tariff filing for the exclusive use of the Military has been ruled on by the Supreme Court:

> "The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement." *

Section 404(b) of the Act, like Section 2 of the Interstate Commerce Act construed by the Court, is plainly intended to prevent the inequality and discrimination inherent in a tariff which differentiates solely on the basis of the character or class of shipper.

The "equality clause" embodied in statutes regulating commerce proscribes tariffs based upon the person of the sender rather than upon the carriage of goods (resulting in the charging of higher rates for the carriage of goods for all shippers but one). Such tariffs, repugnant to the

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* *I.C.C.* v. *Delaware, L. & W. R. Co.*, *supra* at p. 252. (A tariff for shipments of all shippers exclusive of one, the forwarder. Whereas the PAA tariff is for shipments for one shipper, the Military, exclusive of all other shippers, civilian and governmental.)

meaning of the equality clause, are tainted with the
22 stigma of "unjust discrimination," and this rule has been uniformly applied for a hundred years.*

9) *The Federal Aviation Act provides no exemption for the Government from the Equality Clause.* Over the years, through various amendments to the Interstate Commerce Act, exceptions to the Equality Clause have been enacted; Section 22, "Restrictions," provides that "Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for . . .," and nothing in the chapter shall prevent reduced or free passenger fare for, specified governmental units, government personnel, charitable organizations, railway or other personnel, etc. Chief among the beneficiaries of the restriction permitting carriage of property free or at reduced rates by rail is the United States. Section 317(b) provides that the "Restrictions" set forth in Section 22 (as well as the exceptions to the prohibition of free transportation of passengers set forth in Section 1(7) shall apply to common carriers by motor vehicles. Had not the Equality Clause otherwise applied to the United States there would have been no need for the inclusion in Section 22 of the United States.

In the case of the Federal Aviation Act, however, there is absolutely no comparable restriction, exception or exemption which would make the Equality Clause inapplicable to the United States as a shipper of property. It appears that the Act was deliberately silent on the point. Section 403(b) does provide for reduced or free trans-

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* *Great Western R. Co.* v. *Sutton* (1869) L.R. 4 H.L. 226; *Evershed* v. *London & N W R. Co.*, (1878) L.R. 3 App. Case 1029, 5 Eng. Rul. Case 351; *Denaby Main Colliery Co.* v. *Manchester, S & L R. Co.* (1885) L.R. 11 App. Case 97; *Wight* v. *U. S.*, 167 U.S. 512, 42 L.ed. 258, 17 S. Ct. 822 (1897); *I.C.C.* v. *Alabama Midland R. Co.*, 168 U.S. 144, 42 L.ed 414, 18 S. Ct. 45 (1897); *James McWilliams Blue Line* v. *U. S.*, 100 F. Supp. 66 (S.D.N.Y. 1951).

portation for a carefully delineated list of qualified persons and for a nominal category of property. The United States as such is not a qualified recipient. For property in foreign air transportation the Board has no authority to expand the list of beneficiaries. To this limited extent the Act provides a counterpart for Sections 1(7) and 22 of the Interstate Commerce Act.

23 *A fortiori*, since there is no exception provided to the United States from the Equality Clause, that Clause applies to tariffs which provides discriminatory rates to the United States and renders such tariffs unlawful.

10) *Repeal of Section 22 or Amendment of Federal Aviation Act?* The Congress is aware of the fact that the rails have legal basis for the quotation of rates for the United States Government which is not accorded the air industry. A strenuous attempt was made in 1957 to amend Section 22 by limiting its applicability to times of emergency or for its outright repeal.

> "The Air Transport Association of America favors outright repeal of section 22 insofar as it relates to the granting of a free or reduced rates for transportation to the United States, State or municipal governments...." *

On the other hand, insofar as Section 22 related to free or reduced rates for certain classes of passengers for which there is comparable authority for air carriers, the Air Transport Association, of which Pan American was an active member, did not oppose the retention of Section 22. But it was clear that air transportation recognized it did not have the Section 22 authority and opposed it for the surface competition.

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* Senate Report No. 410, 87th Cong., 1st Sess., 1957, 2 U.S. Code Congressional and Administrative News 1783.

The Congress refused to delimit Section 22. And, of utmost significance here, the Congress addressed itself to the lack of authority in air transportation to provide reduced rates for property of the United States. The House Managers in their Statement in the Conference Report recognized that air carriers were at a competitive disadvantage in their ability to bid for Government traffic and concluded:

> ". . . the question whether the Civil Aeronautics Act of 1938 should be amended to provide language comparable to that of section 22 is a matter which would be proper for consideration by the respective legis-
> 24 lative committees of both Houses along with the various proposals which have been made for modification of existing law in relation to the rendering of transportation services to the Government at reduced rates." *

As the Congress has made clear, there is no legal sanction for the reduced rates filed by Pan American *for common carriage* which drastically discriminate in favor of the government to the injury of the general shipping public. There is no Section 22 type provision in the Federal Aviation Act.

No amount of legerdemain can transmute the reduced rate for the government as a shipper into a common carriage commodity tariff universally applicable under the statutory provisions requiring equality for all shippers of the same commodity. The challenged PAA tariff is unlawful. The Board must order PAA to discontinue its use immediately.

II

11) *Plea for Expedited Treatment.* Complainant respectfully requests that the Board expedite consideration

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* Conference Report No. 1171, *Ibid.*, p. 1790.

of this Complaint and that if parties should so request it be set for hearing of oral argument thereon at the earliest practical time. There is no reason, need, or requirement for an evidentiary hearing. The issue posed is purely legal. It can be disposed of by brief to the Board, supplemented by oral argument if the Board or parties so desire.

12) *Embarrassment of the Defense Department in participating in unlawful transportation.* An unlawful tariff is improper in any event, but when a government agency is the illegal beneficiary of unlawful rates, the regulatory agency is under obligation to move with utmost dispatch to remove the unlawful burden upon the agency which must continue to ship, and obviously wants to be in strict compliance with law. The Department of Defense should not be subjected to further embarrassment.

25 13) *Need for clarification before the imminent awards by MATS of 1965 traffic.* MATS is about to negotiate firm contracts for its 1965 fiscal commercially augmented airlift. By this filing it is on notice that the PAA impedimenta tariff constitutes unjust discrimination and is unlawful. MATS will enter into contracts based upon impedimenta rates at its own peril. When the rates are discontinued as unlawful, will MATS be required to pay the going rates applicable to all shippers?

In *U. S.* v. *Associated Air Transport*, 275 F. (2d) 827 (5th Cir. 1960), 6 Avi. 17902, the Court noted that when the government demanded and was accorded a lower rate (by making ferry mileage free) other shippers not so favorably situated were required to pay more to make up for the lower rate to the government, and that such shippers would at least be entitled to a rate reduction if the rates charged the government are adequate. The Court concluded:

> "The short of it is that when Congress seeks to give the Government a preferred transportation status, it

does so in plain terms. In the meantime, Congress, enlightened by history and scandals of national proportions, has expanded its arsenal to combat these invidious discriminations which like all fraud are 'as versable as human ingenuity.' ''

The Court allowed heavy awards to the carriers based on their valid tariffs after disallowing the discrimination on behalf of the government.

Should a comparable rule prevail here, the damage can be astronomical. Prompt ruling by the Board can avoid all this—and at the same time do equity to the charter contractors who are being subjected to the unfair competition of unlawfully low rates by PAA.

WHEREFORE, The Flying Tiger Line Inc. respectfully requests the Board to order Pan American World Airways, Inc. to discontinue its local specific commodity rates—Item 1001—Military Stores/Impedimenta, N.E.S., moving on U. S. Government Bills of Lading, published by World Tariffs Corporation, Agent, Local and Joint Military Air Cargo Tariff No. C-MS-1, CAB No. 2, and to discontinue demanding, charging, collecting or receiving any
26 such discriminatory rates or enforcing any such discriminatory classification, rule, regulation or practice, and to cancel such rates forthwith.

Respectfully submitted,

THE FLYING TIGER LINE, INC.
By /s/ NORMAN L. MEYERS
General Counsel

27 CERTIFICATE OF SERVICE

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29 BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

Docket No. 15195

In the Matter of Rates of

PAN AMERICAN WORLD AIRWAYS, INC.

for Military Stores/Impedimenta, N.E.S., moving on U.S. Government Bills of Lading

Answer of Pan American World Airways, Inc. to Complaint of The Flying Tiger Line, Inc.

The Flying Tiger Line, Inc. ("Flying Tigers") has complained * that certain Pan American World Airways, Inc., ("Pan American") military impedimenta rates are "unjustly discriminatory" because they are offered only to the United States Government, and has asked the Board to "take summary action" to order removal of the alleged discrimination. It has served the complaint on the Department of Defense and MATS, *inter alia*, in an undisguised effort to dissuade the military from using the more economical and convenient transpacific air service which Pan American is uniquely able to provide.

This is not the first time that Flying Tigers has complained about Pan American's military impedimenta rates. Never before, however, did it advance its present
30 theory that these low rates are automatically illegal because they apply only in connection with ship-

* The complaint states that it is brought under Rule 505 of the Rules of Practice but that rule is inapplicable, since it refers to complaints requesting suspension. We assume that the Board will deal with the complaint as though it were filed under Rules 501 and 502.

ment on U.S. Government bill of lading. If Flying Tigers is correct in this afterthought, the Board has countenanced and, indeed, encouraged illegality for years.

We believe that the complaint is so clearly unfounded that it should be dismissed forthwith. Should the Board determine to entertain it, however, it may not take the summary action requested by Flying Tigers, but must set the matter—expanded to consider similar rates of other carriers as well—for public hearing.

A.

First, it is appropriate to note that special low rates for military impedimenta moving on U.S. Government bill of lading are an established and accepted concept in air transportation. The Board has considered the level of such rates on several occasions, and has approved rates which, under Flying Tigers' new theory, would be unlawful.

Although Flying Tigers' interest appears limited to Pan American's transpacific rates, since this apparently is the area in which it hopes for military charter business, the Pan American rates complained of apply across the Atlantic as well as the Pacific. The rates apply, in both cases, to military bases served under exemption authority as well as to cities listed in Pan American's certificates. Further, although Flying Tigers has complained only against *Pan American's* rates, both Seaboard World Airlines, Inc. ("Seaboard") and Trans World Airlines, Inc. ("TWA") offer military impedimenta rates across the Atlantic which are, for all practical purposes, identical with the Pan American rates complained of. Obviously, should the Board consider that the complaint raises any substantial question, the same question exists in connection with all these military impedimenta tariffs.

31

The Board's views with respect to these and similar military impedimenta tariffs are clearly shown by the following:

1. In Order No. E-19046, adopted November 29, 1962, the Board dismissed a Flying Tigers' complaint requesting (a) investigation of military impedimenta rates from Travis Air Force Base, and (b) as interim relief, the revocation or suspension of Pan American's exemption to serve Travis. Flying Tigers made much more elaborate and detailed allegations of illegality in that complaint than in the barebones complaint it has filed here. But the Board found "the complaint does not set forth facts sufficient to warrant investigation". It found that Flying Tigers' comparison of the proposed military impedimenta rate with the Board's minimum rate for one way MATS charters was "inappropriate", since "scheduled route operations normally involve movement of traffic in both directions and this factor would tend to support a lower rate for this type of service". Further, Pan American having pointed out that the reasonableness of the military impedimenta rates depended in part on overall yield, based on the total mix of traffic, the Board noted:

> "We know of no principle requiring that each and every cargo rate bear precisely the same relationship to cost. On the contrary, airfreight rate structures historically have contained a range of rates depending on the commodities involved".

2. In Order No. E-19503, adopted April 17, 1963, the Board renewed Pan American's exemption authority to serve Travis Air Force Base despite the protests of several carriers, including Flying Tigers. Here again Flying Tigers argued that Pan American's military impedimenta rates might divert military traffic then moving via planeload charters. The Board answered this as follows:

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> "As pointed out in Tiger's and World's answers, approval of this exemption may result in military cargo being transported more cheaply than heretofore and could result in substantial savings to the government, and in the moving of this cargo over the

routes of a certificated carrier, both of which are aims of the Board. Pan American can provide less than planeload service in the markets in question, and thereby provide a service to the Defense Department that neither Tiger nor World can provide and that is not available by another means".

3. In Order No. E-20136, adopted October 29, 1963, the Board imposed a minimum rate condition in renewing the exemptions of Pan American, Seaboard and TWA to serve Dover and McGuire Air Force Bases in transatlantic service. It imposed such a condition "to assure that the operations permitted and authorized herein are conducted on a sound economic basis and in conformity with the best interests of the public". The Board's concern was to avoid unreasonably low rates, but not with the technical legal question of "undue discrimination" now raised by Flying Tigers.

4. More recently, by letter dated February 7, 1964, Chairman Boyd advised the Secretary of Defense of the Board's views concerning reasonable minimum military impedimenta rates. He made clear that the Board shared the desire of the Department of Defense "that the military establishment have the benefit of the lowest possible rates in the interest of economy in governmental operations" but went on to state the Board's conviction that such
33 rates should be maintained "on a sound economic basis".* This letter implicitly rejects the position

* As noted above, the Board established minimum rates as a condition for exemption authority to serve Dover and McGuire. A similar issue has been raised in connection with Pan American's pending application for renewal of its exemption authority to serve Travis Air Force Base (Docket No. 11119). If the Board is concerned about the precise level of rates now in effect to and from Travis, it may be appropriate to condition the exemption on adherence to minimum rate standards, although there is no such competitive problem as led to the conditioning of the exemptions to serve Dover and McGuire. Pan American is the only airline certificated to operate between California and the Orient, and—unlike the situation on the Atlantic—there is no certificated carrier which operates the less economical semi-obsolete CL-44.

that low rates, available only to the Government, are *per se* "unjustly discriminatory" and illegal.

In short, there is no indication in any Board order or other Board action dealing with military impedimenta rates or military base exemptions which in any way suggests any concern about the narrow legal question which is the sole basis of Flying Tigers' complaint. On the contrary, the Board has on numerous occasions approved rates applicable only to military impedimenta below regular cargo rates.

B.

The question raised by Flying Tigers goes far beyond military impedimenta rates. If Flying Tigers is correct in its contention, many other established rates and practices applicable to military or other governmental business would also be subject to the same charge of unlawful discrimination. For example:

1. MATS charter rates, for which the Board establishes a minimum which all MATS contractors automatically convert into a maximum, are well below normally available commercial charter rates. This is true for all MATS
34 contract carriers, including Flying Tigers.*

2. MATS Category A passenger fares similarly are well below those available to other potential users of the services.

3. In the *Certificated Air Carrier Military-Tender Investigation,* 28 CAB 903 (1959) the Board approved an agreement providing for a 10% discount on passenger fares and a higher than normal free baggage allowance

* It is of some relevance, in this connection, that the Board recently tentatively disapproved an IATA agreement to establish minimum cargo charter rates (Order No. E-20543, adopted March 6, 1964).

for personnel of the military agencies and their dependents traveling on change of station orders.**

If the Board should determine that the Flying Tigers' complaint raises a substantial legal question, which warrants investigation, that investigation must be far broader in scope than what Flying Tigers has requested.

C.

Actually, all of the foregoing rates and practices, including the military impedimenta rates, find their principal economic and legal justification (and hence are not "unjustly" discriminatory) not in the fact that the U.S. Government is the user but in the totality of the underlying facts and circumstances. Such circumstances, which include differences in cost, differences in character of
35 service, competitive necessity, benefit to the carriers, as well as others, serve to justify rates lower than those normally available to the public at large.

The existence of such factors is wholly ignored by the Flying Tigers' complaint. Nowhere does it allege that Pan American's military impedimenta rates are unjust or uneconomical for the traffic and circumstances to which they pertain. They are, in fact, fully compensatory to Pan American and impose no burden on any other type of traffic. In short, while the limitation of these rates to use on U.S. Government bill of lading may, technically, constitute "discrimination", there is nothing "unjust" about it, and hence nothing unlawful.

** In a somewhat different area of regulation, the Board (on motion of Bureau Counsel and over the opposition of a number of airlines) eliminated from the *Passenger Credit Plans Investigation*, Docket 10917, any issue relating to Government-transportation request types of arrangements (Order No. E-15148, adopted April 25, 1960).

Indeed, Flying Tigers' failure to make adequate allegations of facts renders its complaint inadequate under the Board's rules. Rule 502 requires that any complaint "shall state the reasons why the rates . . . complained of are unlawful and shall support such reasons with a full factual analysis". Flying Tigers has not deigned to offer *any* factual analysis.

D.

Further, even putting aside the question of *justification*, which Flying Tigers ignores, its contentions as to the state of the law are far too sweeping. Here it is pertinent to quote from the Board's Opinion in the *Military-Tender Investigation*, 28 CAB 902, 911-12:

> "Aside from the considerations of competitive necessity and lower costs of service, the military establishment urges the approval of the 10-percent military discount, as a matter of law, because the Federal Government is the beneficiary. However, there is no provision in the Act which expressly authorizes the granting of reduced-rate air transportation to the Federal
> 36 Government, nor does our review of the legislative history of the Act manifest any intention on the part of the Congress to permit preferential treatment of official military or Government travel. Also, while there are dicta of the Supreme Court indicating that discrimination in favor of the Government is permissible without specific statutory authorization, we are unable to find a square holding to that effect. In any event, it is not necessary under the circumstances of this case for us to predicate our conclusion solely upon any theory that the Federal Government may be granted discriminatory rate concessions without any explicit provision therefor in the Federal Aviation

Act. Rather, the fact that the Federal Government is the recipient of the discriminatory military fare discount is itself another circumstance or condition material to the issue of the validity of the discount. This additional factor, taken into consideration with other factors, serves to buttress our conclusion that the circumstances and conditions surrounding official military travel are substantially different from those of standard-fare travel to justify fare concessions to the military establishment". (Footnotes omitted)

E.

Finally, we note that if the Board does not dismiss the complaint forthwith, it still may not take action in the summary fashion requested by Flying Tigers. Section 1002(f), which authorizes the removal of discrimination in foreign air transportation, permits the Board to so act only "after notice and hearing". Further, in view of the other carriers which have similar tariffs, and the other examples of technical discrimination in favor of the U.S. Government referred to above, any such proceeding would have to be far broader in scope and parties than what Flying Tigers has requested.

Conclusion

The complaint is, in our view, so unfounded and unsupported as to call for summary dismissal. Its obvious purpose is to influence the forthcoming MATS contract
37 awards, and to deter the Department of Defense from taking advantage of the economies and conveniences offered by the only certificated carrier in this area. We doubt that the Department of Defense will be influenced by such tactics.

If, however, the Board does not dismiss the complaint, it must institute and set for hearing an investigation of similar rates.

Respectfully submitted,

PAN AMERICAN WORLD AIRWAYS, INC.
By /s/ HUBERT A. SCHNEIDER
Vice President and
General Counsel

Dated: April 30, 1964

38 CERTIFICATE OF SERVICE

* * * * * * * * * *

Order No. E-20990

39 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 25th day of June, 1964

Docket 15195

PAN AMERICAN WORLD AIRWAYS, INC.
Military Stores/Impedimenta Rates

Order Dismissing Complaint

By complaint filed April 21, 1964, The Flying Tiger Line Inc. requests the Board (1) to order Pan American World Airways, Inc., to discontinue charging, collecting or receiving any rate or enforcing any classification contained in the—

Local Specific Commodity Rates via Pan American World Airways, Inc.—Item 1001—Military Stores/

Impedimenta, N.E.S., moving on U. S. Government Bills of Lading,

published by World Tariffs Corporation, Agent, and (2) to order Pan American to cancel such rates forthwith.[1] In support thereof Flying Tiger alleges that such tariff contains rates, a classification, and a practice affecting such rates which on their face are unjustly discriminatory. Flying Tiger further states essentially (1) that it is a person who may file a complaint against the subject rates; (2) that the tariff plainly shows that it is available solely to the Government as a shipper for Military Stores/Impedimenta N.E.S. when moving on Government bills of lading, and as such is available only to one shipper and is a classification of a shipper and not of a commodity; (3) that the Federal Aviation Act makes no provision for special rates for the Government as do statutes relating to surface carriage; (4) that the Federal Aviation Act, the intent of Congress, and legislative history clearly proscribe the rates and practices contained in Pan American's tariff, and require summary action by the Board to carry out the congressional intent; (5) that the applicable provisions of the Federal Aviation Act are moulded after certain statutory provisions relating to surface transportation which prohibit unjust discrimination; (6) that such provisions have been interpreted as prohibiting inequality between shippers through tariff specifications which determine the applicability of the

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[1] Flying Tiger's complaint will be considered as having been filed pursuant to Rules 501 and 502 of the Rules of Practice. Moreover, since Pan American has canceled matters contained in its local and joint Military Air Cargo Tariff No. C-MS-1, C.A.B. No. 2 issued by World Tariffs Corporation, Agent, and has published the same matters in its Local and Joint Military Air Cargo Tariff No. M-SC-1, C.A.B. No. 351 issued by R. C. Lounsbury, Agent, effective May 1, 1964, Flying Tiger's complaint also will be considered as directed to the latter tariff even though no formal amendment of the complaint has been made.

tariff solely on the basis of the class or character of a shipper, and thus result in the charging of special rates for special shippers; (7) that such interpretation is applicable to section 404(b) of the Act; (8) that the Congress was well aware of the distinctions between rail and air statutes in this regard and has maintained the distinctions; (9) that unlike section 22 of the Interstate Commerce Act, the Federal Aviation Act contains no exemption from the "equality clause", and that the Government is, therefore, not eligible for special treatment under any provision of section 403(b) of the Act; and, (10) that the Pan American tariff is, therefore, clearly unlawful inasmuch as it is a special rate for the Government as the sole shipper in violation of the rule requiring equality for all shippers.

Flying Tiger has also requested expeditious treatment of its complaint and grant of the relief requested therein to avoid embarrassment of the Department of Defense inasmuch as it is the "illegal beneficiary of unlawful rates", and to obtain resolution of the problem before award of MATS contracts. The carrier has suggested that there is no need for a formal hearing in this matter, and that briefs and argument to the Board should be accomplished as soon as possible, if any party should request such, or the Board should deem either to be appropriate.

Pan American by answer filed April 30, 1964, argues basically (1) that Flying Tiger's complaint is a deliberate effort to dissuade the military department from using the lower priced services of Pan American which that carrier is economically able to provide; (2) that Flying Tiger's complaint is unique insofar as it attacks the subject rates on grounds of unjust discrimination; (3) that Pan American has special rates applicable to military traffic in both the Pacific and the Atlantic, yet the complaint appears to be directed only against those in the Pacific;

(4) that the Board has reviewed Pan American's exemptions to provide services to military bases, and has imposed rate conditions on such exemptions in connection with which special rates for the military are offered; (5) that other carriers offer special tariff rates for the military; (6) that Flying Tiger's approach must be related not only to the subject military impedimenta rates but also to MATS charter rates and services and other military fares and rates; (7) that all such fares and rates, which have been widely accepted and approved by the Board, would have to be considered in any proceeding pursuant to Flying Tiger's request; and (8) that the fares and rates for the military are justified on a number
41 of grounds, and thus are not unjustly discriminatory. The carrier also implies that the circumstances and conditions surrounding military travel and transportation are substantially different from those prevalent in regular commercial travel and transportation, and thus no question of discrimination is in fact raised by different charges for the military as compared to other shippers.[2]

Clearly the Act and the law generally require equality of treatment and preclude the offering of special fares or rates for special persons or shippers. It has been held, however, that special fares for certain categories of persons are not precluded merely because such persons are not listed in section 403(b) of the Act, and that the anti-discrimination provisions of the Act are not violated when different fares or rates are offered to different persons in instances in which the conditions and circumstances of carriage are substantially dissimilar, or if such carriage is in fact not like and contemporaneous, or if there are sub-

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[2] Pan American also protests the requested summary action, in view of the terms of section 1002(f) relating to action "after notice and hearing", and the substantially broader scope in which it views the question of military fares and rates if the Board is persuaded to take action in response to Flying Tiger's complaint.

stantial differences in the types of traffic to which the fares or rates are applicable. Included in the special fares and rates which have been permitted to become effective on the basis of the foregoing principles are the fares for personnel of the armed services traveling at the expense of the Government. The latter fares were formally considered by the Board in a full evidentiary proceeding, and were found to be lawful basically because the circumstances and conditions surrounding official military travel were found to be substantially different from those prevailing in regular commercial travel.[3] Additionally, the carriers have through the years made available a variety and a succession of fares and rates for domestic, overseas, and foreign transportation of military personnel and goods at Government expense, and indeed Flying Tiger itself currently has on file certain tariffs which offer rates for military stores/impedimenta transported on Government bills of lading.[4]

The complaint of Flying Tiger does not contest the Board's earlier determinations in this regard, nor does the carrier attempt to distinguish the instant situation. Rather, the carrier states categorically, on the basis of the broad rule of equality and the proposition that fares and rates available only to the Government are contrary to the law, that the instant offering of fares to the military department is unlawful as such. In these circumstances we are not persuaded that the relief requested by Flying Tiger is warranted, or that our earlier determinations relating to the differentiation between military and standard commercial travel, and the lawfulness of fares
42 and rates for official military transportation at Government expense require review. Consequently, and since Flying Tiger does not challenge the rates on grounds

[3] *Military Tender Investigation*, 28 C.A.B. 902 (1959).

[4] The Flying Tiger Line Inc., C.A.B. No. 32, Agent Brunner's C.A.B. No. 6.

other than that they are illegal *per se,* we will not at this time undertake a formal investigation looking to whether or not the subject rates of Pan American or the numerous other fares and rates currently applicable to military transportation are unjustly discriminatory.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 403(b), 404(b), and 1002(f) thereof,

IT IS ORDERED THAT:

The relief requested by the Flying Tiger Line Inc., in its complaint in Docket 15195, is denied, and the complaint is dismissed.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

* * * * * * * * * *

Prehearing Conference Stipulation

Pursuant to Rule 38(k) of the Court, and subject to its approval, the parties hereby stipulate and agree as follows with respect to the issues and the procedures and filing date for the joint appendix herein.

I

Issues

The Flying Tiger Line Inc. ("Flying Tigers") seeks review of Order E-20990 of the Civil Aeronautics Board ("the Board") dismissing a formal complaint filed by Flying Tigers against freight rates contained in a military impedimenta tariff by Pan American World Airways, Inc. (Pan American) for the sole and exclusive use of the

Military Establishment of the Federal Government. The effect of the Board action was to allow the tariff to become effective without rejection, suspension, or investigation as to its lawfulness under the Federal Aviation Act of 1958, as amended. The freight rates therein are lower than regular freight rates available to other shippers, and are for operations for which Flying Tigers competes.

The issues presented by Flying Tigers are:

1. Whether the application of different rates to different shippers for the transportation of like cargo constitutes an unjust discrimination between shippers prohibited by Sections 403(b) and 404(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1373(b), 1374(b).

2. Whether the Board's order is invalid because it allows lower rates to be charged to the Federal Government as a shipper, as compared to all other shippers, for the transportation of like cargo, in violation of Sections 403(b) and 404(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1373(b), 1374(b).

Respondent reserves the right in its brief to rephrase petitioner's issues or to take the position that some or all of the points raised in said issues are irrelevant, without foundation in the record, or otherwise not open to review.

II

Procedures with Respect to Printing of the Joint Appendix, and Use of Unprinted Portions of the Record

The joint appendix shall contain the materials required to be printed by the Rules of the Court, the materials designated by the parties as hereinafter provided, and this

stipulation and the order of the Court approving the stipulation.

All briefs shall cite the record by referring to page numbers in the certified transcript of record, in the form "Tr. ....)." At or prior to the time each party serves its brief, it shall also serve its designation of the portions of the certified record to be reproduced in the joint appendix. As soon as all such designations have been made, the petitioner shall cause the joint appendix to be printed, and shall file it within 10 days after the due date for the reply brief. In the joint appendix, the page numbers of the record as certified to this Court shall appear in the left margin at the place where each new record page begins on the page of the joint appendix, and a running head showing the record page or pages appearing thereon shall be placed at the outer top corner of each page of the joint appendix. (The usual consecutive numbering of joint appendix pages shall appear at the center of the top of each page.)

It is further agreed that any party, in brief or at the hearing in the case, may refer to and rely upon any portion of the original transcript herein which has not been reproduced to the extent that such portion may be material to the stipulated issues, it being understood that any portions of the record thus referred to will be reproduced in a supplemental joint appendix if the Court so desires.

/s/ Edwin Jason Dryer
Attorney for Petitioner

/s/ G. D. Ozment
Attorney for Respondent

Dated: September 29, 1964

* * * * * * * * * *

Prehearing Order

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: Oct. 5, 1964

BRIEF FOR PETITIONER
THE FLYING TIGER LINE INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,859

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition for Review of Order of the Civil Aeronautics Board

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STATEMENT OF QUESTIONS PRESENTED

The questions are:

1. Whether the application by an air carrier of different rates to different shippers for the transportation of like cargo (i.e., the contemporaneous transportation of like cargo by like means under substantially similar circumstances and conditions) constitutes an unlawful discrimination between shippers prohibited by Sections 403(b) and 404(b) of the Federal Aviation Act of 1958, 72 Stat. 758, 760, as amended, 49 U.S.C. §§ 1373(b), 1374(b).

2. Whether Order E-20990 of the Civil Aeronautics Board is invalid because it allows lower rates to be charged to the Federal Government as a shipper, as compared to all other shippers, for the transportation of like cargo, in violation of Sections 403(b) and 404(b) of the Federal Aviation Act of 1958, 72 Stat. 758, 760, as amended, 49 U.S.C. §§ 1373(b), 1374(b).

INDEX

TABLE OF AUTHORITIES

* Cases chiefly relied upon are marked with asterisks.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,859

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition for Review of Order of the Civil Aeronautics Board

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BRIEF FOR PETITIONER THE FLYING TIGER LINE INC.

JURISDICTIONAL STATEMENT

Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 74 Stat. 255 (1960), 75 Stat. 497 (1961), 49 U.S.C. § 1486, authorizes this Court, with one exception not pertinent here, to review "Any order, affirmative or negative, issued by the [Civil Aeronautics] Board . . . upon petition, filed within sixty days after the entry of

such order, by any person disclosing a substantial interest in such order." Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009, similarly authorizes review by this Court of orders of the Civil Aeronautics Board. This is an appeal from Civil Aeronautics Board Order No. E-20990, June 25, 1964 (Tr. 39) which dismissed Petitioner's Complaint and denied it the relief requested that the Board order Pan American World Airways, Inc. to discontinue a commodity tariff for "Military Stores/Impedimenta, N.E.S., moving on . . . U. S. Government Bills of Lading . . . [or the equivalent]" (Tr. 6) restricted to the use of the U. S. Department of Defense only, as shipper, (Tr. 5) as being unjustly discriminatory. Petition for review was timely filed.

STATEMENT OF CASE

Pan American World Airways, Inc. (Pan Am) has published in a "Local and Joint Military Air Cargo Tariff" rates and charges for "Military Stores/Impedimenta, N.E.S., moving on . . . U. S. Government Bills of Lading . . . [or the equivalent]" (Tr. 6) covering movements between points in the United States and points in Asia, Africa and Europe (impedimenta rates). These rates and charges apply to the shipment of the miscellany of military equipment and the wide variety of general commodities shipped by the Military Establishment in support of bases overseas.[1] This tariff applies only on shipments moving for the U. S. Department of Defense. (Tr. 5)

Pan Am has also published a "Local and Joint Air Cargo Tariff" naming Atlantic and Pacific general commodity rates[2] between points in the United States and

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1 In addition there are special rates and charges for two specific items—military baggage and household goods of the military. (Tr. 4) The same legal issues, as to the validity of reduced rates for the Department of Defense as shipper, apply to these items as apply to the general classification of military impedimenta referred to above.

2 In addition there are minor specific commodity rates and charges stated in percentages of general commodity rates. (Tr. 14)

points *inter alia,* in Asia, Africa and Europe. (Tr. 14) The rates and charges Pan Am charges the Department of Defense are substantially lower than the rates and charges Pan Am charges other shippers for the carriage of similar general commodities, as evidenced in this latter tariff.

The commodities moving under both Pan Am tariffs are like in kind and character; they move in the same equipment on the same flights. The commodities moving under impedimenta rates become part of the common carriage mix of Pam Am airfreight.

The impedimenta rates for the Department of Defense are not only lower than regular freight rates available to other shippers for airfreight movements under the same conditions but they are also lower than those which Flying Tigers is permitted to charge in competitive operations. Flying Tigers has, and for many years past has had, firm contracts for the movement of plane-loads of air cargo for the Military Air Transport Service (MATS) at rates at the minima prescribed and permitted by the Civil Aeronautics Board. These minima rates are now substantially undercut by the impedimenta rates of Pan Am.

Flying Tigers in its Complaint to the Board charged that Pan Am's tariff rates for the Department of Defense as a shipper, at levels lower than similar rates to other shippers for the carriage of like cargo contemporaneously in the same trips, are in violation of Sections 403(b) and 404(b) of the Act. Flying Tigers charged that the rates to the Department of Defense as shipper were unjustly discriminatory and requested the Board to order Pan Am to discontinue "charging, collecting, or receiving any such discriminatory . . . rate . . . or enforcing any such discriminatory . . . classification . . ." pursuant to Section 1002(f) of the Act, 72 Stat. 788 (1958), 49 U.S.C. § 1482. The "removal of discrimination in foreign air transportation" is specifically required by the Act.

The Board in its Order Dismissing Complaint stated that Flying Tigers did not contest the Board's earlier decisions, particularly one in which it approved special fares for the personnel of the armed services traveling at the expense of the Government.[1] The Board concluded it would not "review" its earlier determinations on this score and would not undertake an investigation looking into whether the Pan Am impedimenta rates or any other military rates are unjustly discriminatory. Accordingly, the Flying Tiger Complaint was summarily dismissed.

STATUTES INVOLVED

The statute principally involved is the Federal Aviation Act of 1958, as amended, 72 Stat. 731 *et seq.*, 49 U.S.C. § 1301 *et seq.*, salient provisions of which are set forth in Appendix I. For ready reference Sections 2 and 3 of the Interstate Commerce Act, 24 Stat. 379, 380 (1887), as amended, 49 U.S.C. §§ 2, 3, and Section 216 (d) of the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d), are likewise set forth in Appendix I. Other statutory provisions are cited or quoted in their appropriate place in the text of this brief.

STATEMENT OF POINTS

1. The application by an air carrier of different rates to different shippers for the contemporaeous transportation of like cargo by like means under substantially similar circumstances and conditions constitutes unjust discrimination between shippers and is prohibited by Sections 403(b) and 404(b) of the Federal Aviation Act of 1958.

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1 *Certificated Air Carrier Military-Tender Investigation*, 28 C.A.B. 902 (1959). This case concerned military passengers within the United States and the Board bottomed its determination upon findings of circumstance and conditions peculiar to the domestic passenger issues in the case considered in a full evidentiary proceeding. Flying Tigers, a cargo carrier, was not and could not be a party in that proceeding.

2. That Act does not provide an exemption from these prohibitions for air transportation of property of the United States corresponding to such exemptions accorded to surface transportation.

3. Pan Am's special impedimenta rates, available to the U. S. Department of Defense only, represent unjust discrimination and are illegal.

4. The Board's Order E-20990 is invalid because it permits such illegal rates.

SUMMARY OF ARGUMENT

I

The status of the Department of Defense as a shipper is not a circumstance or condition which permits Pan Am to charge lower rates to the Department of Defense for the transportation of property than it charges other shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic in the absence of a restriction exempting the U. S. government from the statute requiring equal treatment of shippers.

A. The equality clause of the Federal Aviation Act, like its statutory precedents in respect to other forms of transportation, prohibits different rates to shippers for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

B. Mere difference in identity of shippers is not a difference in "circumstances and conditions" which can justify different rates.

C. No difference, except in the identity of shippers, underlies Pan Am's special impedimenta rates for the Department of Defense.

II

The Federal Aviation Act of 1958, as amended, unlike the statutes governing surface transportation, does not provide a restriction exempting the U. S. government from the requirement that air carriers charge equal rates to shippers for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

A. The Congress authorized the Board to permit reduced fare transportation in foreign commerce for passengers only.

B. The Congress deliberately refused to provide for reduced rates in air transportation for property for the United States as it has provided for all forms of surface transportation.

III

Upon the record before it, the Board should not have dismissed Flying Tigers' Complaint.

A. Since the Pan Am special impedimenta rates are limited to one shipper only, the U. S. Department of Defense, they expressly negative the applicability of any difference in "circumstances and conditions" which might otherwise justify different rates for different shippers. Reduced rates based upon a difference in circumstances and conditions would have to be equally available to all other shippers to whom such different circumstances and conditions equally apply. Since the tariff is not available to others under any circumstances, it is clearly a tariff based upon mere difference in identity of shippers, contrary to the equality clause, and illegal on its face. Summary dismissal of Flying Tigers' Complaint showing that illegality was error.

B. Even if the Board considered that there might be different circumstances and conditions justifying Pan Am's

reduced rates, the dismissal of Flying Tigers' Complaint was still erroneous because:

1. As just noted, the tariff by its terms precludes the consideration of any such circumstances and conditions;

2. The existence of such circumstances and conditions is not of record in this proceeding—the Board did not conduct an investigation or hold a hearing upon which facts might be found;

3. The Board cannot resort, as it does, to generalized references to facts in other proceedings in which Flying Tigers was not a party and presenting other issues to meet the factual deficiencies herein;

4. For purposes of summary dismissal the facts asserted in Flying Tigers' Complaint must be assumed to exist, and the Complaint dismissed only if it is without merit on those asserted facts.

C. On the record before it, with the facts in Flying Tigers' Complaint undisputed in Pan Am's Answer, the Board should have granted the relief requested by Flying Tigers and should have ordered Pan Am to discontinue its special impedimenta tariff forthwith.

ARGUMENT

I.

THE STATUS OF THE DEPARTMENT OF DEFENSE AS A SHIPPER IS NOT A CIRCUMSTANCE OR CONDITION WHICH PERMITS PAN AM TO CHARGE LOWER RATES TO THE DEPARTMENT OF DEFENSE FOR THE TRANSPORTATION OF PROPERTY THAN IT CHARGES OTHER SHIPPERS FOR DOING FOR THEM A LIKE AND CONTEMPORANEOUS SERVICE IN THE TRANSPORTATION OF A LIKE KIND OF TRAFFIC IN THE ABSENCE OF A RESTRICTION EXEMPTING THE U. S. GOVERNMENT FROM THE STATUTE REQUIRING EQUAL TREATMENT OF SHIPPERS.

The invalidity of Pan Am's impedimenta rates favoring the Department of Defense as a shipper involves consideration of the rate-making provisions of the Federal Aviation Act and the precedents upon which they are founded. The Act is but one of a series of statutes establishing the regulatory controls over rate-making—for the rails, for motor carriers, for carriers by water, for surface forwarders and for air carriers. Basic to rate-making principles is the "equality clause" which is found in the governing legislation of all four modes of transportation.

A. Origin of the Equality Clause

At Common Law. Originally "railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service." *ICC* v. *Baltimore & Ohio R. Co.*, 145 U.S. 263, 275 (1892); *cf. Parsons* v. *Chicago & Northwestern Ry. Co.*, 167 U.S. 447 (1897).

Equality on the Rails. The establishment of equality of treatment for shippers and users of the railroads and elimination of the practices of rebating and unjust dis-

crimination as between shippers were key objectives of the Interstate Commerce Act. That Act contains two provisions designed to produce equality of treatment and two provisions limiting and restricting rigid equality.

Section 2 of Part I of the Interstate Commerce Act prohibits differences in charges for the same transportation services by railroad as unjust discrimination. Section 3 of that Part prohibits undue preferences or prejudices.[1] Section 1(7), 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(7), as a limitation upon Sections 2 and 3, permits free transportation for carefully listed categories of passengers. Section 22, 24 Stat. 387 (1887), as amended, 49 U.S.C. § 22, sets forth restrictions upon Sections 2 and 3; it permits transportation "free or at reduced rates" for specified categories of shippers and passengers and thus restricts the scope of Sections 2 and 3—which proscribe unjust discriminations and undue preferences or prejudices.

Equality for Motor Carriers. The Motor Carrier Act (Part II of the Interstate Commerce Act) was enacted in 1935 shortly before the Civil Aeronautics Act of 1938 (now Federal Aviation Act). It adopted the regulatory scheme then applicable to the rails. Section 216(d) of Part II of the Act combines for motor carriers the essential features of Sections 2 and 3 of the Act. And Section 217(b), 49 Stat. 560 (1935), as amended, 49 U.S.C. § 317(b), provides that the provisions of Sections 1(7) and 22 of Part I of the Act, the limitations and restrictions on the equality requirement, shall apply to motor carriers.

Equality for Water Carriers and Freight Forwarders. Part III of the Act covering water carriers, 54 Stat. 929 *et seq.* (1940), as amended, 49 U.S.C. § 901 *et seq.*, and Part IV covering freight forwarders, 56 Stat. 284 *et seq.* (1942), as amended, 49 U.S.C. § 1001 *et seq.*, likewise follow

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1 Section 4 makes provision for the short haul-long haul problem, not in issue here.

the legislative pattern of Part I in requiring equality of treatment of shippers except as that requirement is specificially limited and restricted. For carriers by water and for freight forwarders discrimination between shippers is proscribed (Section 305 of Part III, 54 Stat. 934 (1940), as amended, 49 U.S.C. § 905; Section 404 of Part IV, 56 Stat. 286 (1942), as amended, 49 U.S.C. § 1004). The limitations and restrictions of Sections 1(7) and 22 are made applicable to such carriers (Section 306(c) of Part III, 54 Stat. 935 (1940), as amended, 49 U.S.C. § 906(c); Section 405(c) of Part IV, 56 Stat. 286 (1942), as amended, 49 U.S.C. § 1005(c)).

For the issues raised in this litigation the significant restriction on the equality clause is found in the opening lines of Section 22 of the Act

> Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States. . . .

But this statutory restriction upon rigid equality of treatment of shippers does *not* appear in the Federal Aviation Act.

B. The Regulatory Scheme of the Federal Aviation Act

The Federal Aviation Act in its equality of treatment of shippers and unjust discrimination provisions is modeled closely upon the Interstate Commerce Act. But in regard to the limitations and restrictions upon rigid equality it departs materially and consciously from its sister Act.

Section 404(a) of the Act provides that "It shall be the duty of every air carrier . . . to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation . . ."

Section 404(b), in practically a verbatim lifting of language from Section 216(d) of Part II of the Interstate Commerce Act, provides:

Discrimination

> (b) No *air* carrier or foreign air carrier *shall* make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or *subject any particular person,* port, locality or *description of traffic in air transportation to any unjust discrimination* or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Italics supplied)

As noted above, this provision is a consolidation of Sections 2 and 3 of Part I of the Interstate Commerce Act (Appendix I). Section 2 of that Act, relating to "unjust discrimination", is drafted to enforce equality of rates and charges among shippers and passengers for like services between the same points. It is this "unjust discrimination" portion of Section 404(b) (as italicized in the quotation above) which is brought into issue by the Pan Am impedimenta tariff.

The Congress did not extend to air transportation all the limitations and restrictions upon rigid equality in treatment of shippers which it uniformly provided for surface transportation. It did not make the provisions of Sections 1(7) and 22 of the Interstate Commerce Act applicable to air. However, the Congress in the Aviation Act did give relief from the equality clause, in respect to *passenger transportation only,* to very selective groups of persons, and from time to time the Congress has added to this list. Thus, in Section 403(b), which basically is designed to prohibit rebating, the Congress provides that nothing in this Act shall prohibit "issuing or interchanging tickets or passes for free or reduced-rate transportation" to enumerated categories of persons and *inter alia*

> in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe.

There is no similar limitation or restriction in this section or elsewhere in the Federal Aviation Act relating to the carriage, storage or handling of *property*.

C. Definition of Unjust Discrimination

Pan Am, to justify the discrimination in favor of the Department of Defense as shipper in its impedimenta rate, would rely upon whatever stretch may repose in the word "unjust" before "discrimination" in Section 404(b) quoted above.

The Board, in the few instances in which it thus far has been called upon to interpret "unjust discrimination" has found that there are three conditions precedent to a finding of unjust discrimination:

> (a) The services to which the reduced fares would apply are like, and contemporaneous with, services to which standard fares apply;
>
> (b) the services pertain to the transportation of like traffic; and
>
> (c) the circumstances and conditions under which the reduced- and standard-fare services are rendered are substantially similar. *Certificated Air Carrier Military-Tender Investigation,* 28 C.A.B. 902, 905 (1959)

See also *Summer Excursion Fares Case,* 11 C.A.B. 218 (1950); *Investigation of Braniff Airways Excursion Fares,* 12 C.A.B. 227 (1950); *Tour Basing Fares,* 14 C.A.B. 257 (1951); *Free and Reduced-Rate Transportation Case,* 14 C.A.B. 481 (1951).

This definition of unjust discrimination is derived directly from the definition thereof found in Section 2 of the Interstate Commerce Act upon which Section 404(b) of this Act is based (Appendix I). The definition in Section 2 has

been subjected to Court test. And it is a settled rule of construction that when a statutory provision is taken from the same provision in a pre-existing statute, the construction accorded the earlier statute applies fully to the latter. This rule, in fact, was enunciated in connection with the very statutory provision in issue here. *ICC* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235, 253 (1911).[1]

Pan Am would justify its special military impedimenta rates on the ground that the circumstances and conditions involving cargo carriage for the Department of Defense as shipper are not "substantially similar" to those for other shippers, and under the third prong of the Board's test, *supra,* there would be no unjust discrimination (Tr. 34). It is beyond dispute that the first two elements of the Board's test for unjust discrimination are met. The Board, it would appear, likewise considers the third test factor, of similar circumstances and conditions, to be applicable. Its decision rests, however, essentially and inevitably upon the proposition that the mere differences between the Department of Defense *as a shipper* and other shippers as such is sufficient to negative "substantially similar . . . circumstances and conditions".[2]

D. Different Shippers Do Not Justify Different Rates

However, the Supreme Court long ago ruled that a difference in *shippers* is not a dissimilar circumstance and condition within the meaning of Section 2 of Part I of the

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1 "It is not open to question that the provisions of § 2 of the act to regulate commerce were substantially taken from § 90 of the English railway clauses consolidation act of 1845, known as the 'equality clause' . . . And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us."

2 No other difference in circumstances or conditions appears in the record and no other difference is relied upon by the Board. The Board did not consider the different circumstances and conditions alleged by Pan Am. This is discussed under Point III, *infra.*

Interstate Commerce Act. In the leading case of *ICC* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235 (1911), the railroad provided a carload tariff available to all shippers exclusive of one, the forwarder who contended he was a "shipper" in contemplation of law and a "person" within the meaning of Section 2. In contrast in fact but identical in legal issue, here Pan Am makes available a tariff for one shipper, the Department of Defense, to the exclusion of the other shippers. The Supreme Court made short shrift of the issue in the *Delaware Case* in a ruling decisive for the case here. The Court stated:

> The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that, as the section forbids a carrier from charging 'a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, . . .

> than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions' [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], authority is to be implied for basing a charge for transportation upon ownership or nonownership of the goods tendered for carriage, upon the theory that such ownership or nonownership is a dissimilar circumstance and condition within the meaning of the section.
>
> But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. (*Id.*, 252-3)

The Court pointed out that "at the time of the passage of this act to regulate commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender . . ." (*Id.*, 254) citing *Great Western R. Co.* v. *Sutton* (1869) L.R. 4 H.L. 226; *Evershed* v. *London & N.W.R. Co.* (1878) L.R. 3 App. Cas. 1029, 5 Eng. Rul. Cas. 351; *Denaby Main Colliery Co.* v. *Manchester, S. & L.R. Co.* (1885) L.R. 11 App. Cas. 97.

The settled meaning which was affixed to the English equality clause at the time of the adoption of Section 2 of the Interstate Commerce Act applies in construing that Section. Correspondingly the settled meaning of the equality clause and test for unjust discrimination affixed to Section 2 of the Interstate Commerce Act applies to Section 404(b) of the Federal Aviation Act here. *ICC* v. *Delaware, L.&W. R.R. Co., supra; Wight* v. *United States*, 167 U.S. 512 (1897); *ICC* v. *Alabama Midland Ry. Co.*, 168 U.S. 144 (1897).

The Supreme Court considered the issue in another early leading case. That case involved a railroad according rates

to another railroad shipping fuel coal for its own use to a junction point with its own tracks at a level lower than rates accorded other shippers shipping commercial coal to the same point en route to market. The Interstate Commerce Commission held that "the tariffs which contain rates applicable only to the shipments of certain consignees or when a commodity is put to a particular use and the rates which are so restricted to the use of certain shippers and not open to all shippers alike are in violation of section 2 of the act, and unjustly discriminatory in violation of section 3 of the act, and therefore unlawful." *In the Matter of Restricted Rates*, 20 I.C.C. 426, 437 (1911). The Commission was upheld by the Supreme Court in *ICC* v. *Baltimore & Ohio R.R. Co.*, 225 U.S. 326 (1912).[1] In that case the Court stated:

> Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges. (342)

There are cases in which the Supreme Court has found that the circumstances and conditions, under which reduced fares are not unjustly discriminatory, may include circumstances beyond those relating to the facts of the carriage only; but in those cases the only justification for reduced rates recognized was that involving direct competition for traffic provided by another mode of transportation. *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194 (1944); *Barringer & Co.* v. *United*

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1 The *Baltimore* Case is still the law. It was relied upon and cited with approval in *Royal Netherlands Steamship Co.* v. *Federal Maritime Board*, 113 App. D.C. 62, 304 F. 2d 938 (D.C. Cir. 1962).

States, 319 U.S. 1 (1943); *Texas & Pacific Ry. Co.* v. *ICC*, 162 U.S. 197 (1896)

These are the cases relied upon by the Board in looking beyond matters directly relating to the carriage of traffic in applying the "substantially similar" test in the air. *Tour Basing Fares, supra*, at 258. But these cases are readily distinguished from those which, in applying the rigid equality test, have uniformly proscribed different rates based on the different identity of shippers. As the Court stated in the *Barringer* case, *supra*, at 9, in distinguishing that case from the *Delaware* case and the *Baltimore* case, *supra*:

> We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identify of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers.

E. No Other Difference Appears Which Would Permit Pan Am's Different Rates

In the present case no other facts appear indicating different "circumstances and conditions" which might justify Pan Am's different rates. The record simply does not contain any such other facts. The state of the record in this respect is developed separately below.

More importantly, it should be emphasized that the Pan Am tariff, by express limitation on its face to shipments for the Department of Defense, precludes the applicability of any other such justifying differences in circumstances and conditions. If any such differences exist to justify a reduction from Pan Am's regular tariff rates (as Pan Am's answer "implies") then the reduced rates would, under the equality rule, have to be made equally applicable to all other shippers to whom the different circumstances and conditions also apply, and the reduced rate tariff would

by its terms reflect its application to these other shippers. The reduced rate tariff here in issue, of course, does not apply to any other shippers; instead, its affirmative limitation to the Department of Defense forbids its application to other shippers who might otherwise be similarly situated.

That is the gravamen of the Flying Tigers complaint. In the instant case it is unchallenged that Pan Am's special impedimenta rates may be used solely by the Department of Defense (Tr. 5). Such a tariff providing reduced rates for a single shipper for a like and contemporaneous service in the transportation of a like kind of traffic does not, simply because of the character of the shipper, provide different "circumstances and conditions" which permit a differentiation in rates for the service rendered. If the impedimenta rates are to be salvaged it can only be on the basis that there is a restriction on the equality clause (Section 2 of the Act) applicable to such rates. There is no such restriction.

II.

THE FEDERAL AVIATION ACT OF 1958, AS AMENDED, UNLIKE THE STATUTES GOVERNING SURFACE TRANSPORTATION, DOES NOT PROVIDE A RESTRICTION EXEMPTING THE U. S. GOVERNMENT FROM THE REQUIREMENT THAT AIR CARRIERS CHARGE EQUAL RATES TO SHIPPERS FOR A LIKE AND CONTEMPORANEOUS SERVICE IN THE TRANSPORTATION OF A LIKE KIND OF TRAFFIC UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

While the Federal Aviation Act embodies the same equality clause as that found in the Interstate Commerce Act, and while the Federal Aviation Act specifically permits, as a restriction on the equality clause permitting reduced-rate transportation for such *passengers* in foreign air transportation as the Board may designate (*supra*, p. 11), the Federal Aviation Act does not provide, as does the Interstate Commerce Act, that *property* of the United States may move at "free or at reduced rates", in foreign

air transportation or otherwise. The Board pointedly ignores this basic distinction between the two Acts.

The Congress in enacting the Civil Aeronautics Act (now the Federal Aviation Act) borrowed extensively from the Interstate Commerce Act but borrowed selectively and with care. Upon the equality clause assuring equal treatment to all shippers it elected not to place the restriction which Section 22 of the Interstate Commerce Act provides permitting reduced rates for government shipments.

In *Slick Airways* v. *United States,* 292 F.2d 515, 518 (Ct. Cl. 1961), Judge Durfee in discussing the interrelation of Section 22 of the Interstate Commerce Act and Section 403(b) of the Federal Aviation Act stated:

> Section 1 of the Act [*i.e.*, the Interstate Commerce Act] makes it clear, of course, that its provisions apply to common carriers engaged in surface or pipeline transportation. The Act does not apply to the regulation of rates in air transportation, which was accomplished, during the period involved herein, by the Civil Aeronautics Act, supra.
>
> It is the defendant's contention that while there is nothing in the Civil Aeronautics Act which permits reduced rates to the United States, there is nothing in the Act to prevent it. The position taken is that in the enactment of this legislation the intention was expressed that the Act would be construed together with section 22 of the Interstate Commerce Act, as a matter of policy. Without setting forth the legislative history of the Civil Aeronautics Act in detail, it is apparent that proposed sections expressly permitting reduced rates for air transportation to the Government were subsequently deleted at the time of enactment.[3]

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[3] See S. 3027, S. 3420, 74th Cong., 1st Sess.; H. R. 5234, H. R. 7273, S. 2 as originally introduced, and substitute S. 2, 75th Cong., 1st Sess. Substitute S. 2 omitted the provision for Governmental reduced rates contained in S. 2 as originally introduced, and in that form the bill was enacted.

With the absence of a Section 22 for the air in mind, the court in *United States* v. *Associated Air Transport, Inc.*, 275 F.2d 827, 838 (5th Cir. 1960) stated:

> The short of it is that when Congress seeks to give the Government a preferred transportation status, it does so in plain terms.

The refusal to provide a Section 22 type restriction to permit reduced-rate transportation for government shipments in air transportation is accented by the restriction which does permit reduced-rate transportation for government personnel in foreign air transportation (*supra*, p. 11). The silence of Congress makes mandatory a rigid application of the equality clause to the Government as a cargo shipper. It has been a basic rule of statutory construction since the days of Chief Justice John Marshall that what is not included in a statutory provision is deemed to be excluded therefrom by the Congress. In *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827), the Chief Justice pointed out:

> that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be in the general clause had the exception not been made . . .

In omitting government shipments from the restrictive provisions of Section 403(b), the Congress required that the Government as shipper meet the standards of the equality clause generally applicable to shippers.

We are not left, however, to the mere omission of a Section 22 type restriction as proof of Congressional intent that government shipments should not be exempted from the equality clause. Congress has spoken expressly. Amendments to Section 22 were before the Congress in 1957 and in the course of consideration of those amendments Congress recognized that no such exemption authority as Section 22 existed for air transportation of

property of the United States.[1] Thus, the House Managers in their statement in the Conference Report concluded:

> . . . the question whether the Civil Aeronautics Act of 1938 should be amended to provide language comparable to that of section 22 is a matter which would be proper for consideration by the respective legislative committees of both Houses, along with the various proposals which have been made for modification of existing law in relation to the rendering of transportation services to the Government at reduced rates.[2]

The Congress has made it clear—there is no Section 22 type provision in the Federal Aviation Act. There is no legal sanction for the reduced rates filed by Pan Am.

III.

UPON THE RECORD BEFORE IT, THE BOARD SHOULD NOT HAVE DISMISSED FLYING TIGERS' COMPLAINT.

The language of the Board's decision is such as to invite confusion as to the essential basis of its decision, namely, whether the decision is premised upon errors of law, which have been discussed above, or upon an erroneous view of the state of the record, which will be discussed here. This confusion results from:

(a) The Board's reference to that part of Pan Am's Answer wherein Pan Am "implies that the circumstances and conditions surrounding military travel and transportation are substantially different from those prevalent in regular travel and transportation" thus seeking to justify the discriminatory rates;

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[1] Significantly, the air transportation industry, represented by the Air Transport Association, of which Pan Am is an active member, indicated similar recognition in opposing the continuation for surface transportation of those portions of Section 22 which were without counterpart in the Federal Aviation Act. Senate Report No. 410, 85th Cong., 1st Sess., 1957, 2 U. S. Code Congressional and Administrative News 1783.

[2] Conference Report No. 1171, *Ibid.*, p. 1790.

(b) The Board's refusal to investigate, consider or decide the factual issues thus raised for the first time by Pan Am's Answer;

(c) The Board's erroneous premise that "Flying Tiger does not challenge the rates on grounds other than that they are illegal *per se.*"

(d) The Board's erroneous reliance upon facts in an entirely different proceeding, in which Flying Tigers was not a party, in deciding this case on a record in which such facts are absent.

First of all, let us look at Flying Tigers' Complaint to the Board. It described Pan Am's tariff "as providing on their face rates, and a classification, and a practice affecting such rates, which are unjustly discriminatory . . ." and it said:

> The tariff complained of shows on its face that it is available solely to the United States government as a shipper—for "military stores/impedimenta N.E.S.," and such only if "moving on U. S. government Bills of Lading." This is a classification of shipper and not of commodity. (Tr. 19)

At a later point, in asking for expedited consideration, Flying Tigers said:

> There is no reason, need, or requirement for an evidentiary hearing. The issue posed is purely legal. It can be disposed of by brief to the Board, supplemented by oral argument if the Board or parties so desire. (Tr. 24)

At this stage of the proceeding, at the filing of the Complaint, Flying Tigers had shown a difference in rates which was limited to one shipper only and which contained no other apparent justification and which by its terms, being limited to one shipper only, *could not* apply to any other shipper. Since the possibility of any difference in circum-

stances and conditions justifying the rate reduction was completely and expressly precluded by the terms of Pan Am's tariff (because applicable to the Department of Defense and to no other shippers to whom such different circumstances and conditions might also apply), Flying Tigers' view of the need of an evidentiary hearing was correct at this point. Also in these terms (that any difference in circumstances and conditions justifying reduced rates was expressly foreclosed by the terms of the Pan Am tariff limiting it to the Department of Defense) the Board's comment, that Flying Tigers challenged the rates as illegal *per se,* is correct.[1]

Subsequently Pan Am filed its Answer (Tr. 28) in which it asserted essentially two positions:

(a) That Flying Tigers' "present theory that these low rates are automatically illegal because they apply only in connection with shipment on U. S. Government bill of lading" was "so clearly unfounded that it [the Complaint] should be dismissed forthwith." (Tr. 29-30) The Board adopted Pan Am's position. The Board's decision on this aspect of the case presents the simple issue of whether a difference in rates between shippers without any difference in circumstances and conditions, other than the identity of the shippers, is legal. This is, as we view it, the essential issue before this Court.

(b) That Pan Am's low rates are, in any event, justified by "the totality of the underlying facts and circumstances" (referred to in general terms) (Tr. 34) and that, if the Board chose not to dismiss the Complaint, it should schedule a hearing and investigation of these facts (Tr. 36). With regard to this aspect of the case the decision is

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[1] The Board's further view that "Flying Tiger does not challenge the rates on grounds other than that they are illegal per se" is not, however, correct. If, and to the extent that, any justification for the discriminatory rates might be asserted, denial of such justification was clearly implicit in Flying Tigers' Complaint.

not clear because the Board refused to undertake the formal investigation otherwise required by Section 1002(f) of the Act if a factual issue (as to the existence of such justifying facts) had been created by the Pan Am Answer (Tr. 42). At the same time the Board referred to and presumably relied in part upon the existence of some such justifying facts not fully identified which were developed in entirely separate proceedings to which Flying Tigers was not a party (Tr. 41).

If, and to the extent that, the Board's decision is premised on any such factual assumptions as to differences in circumstances and conditions which would justify Pan Am's special impedimenta rates, those facts do not appear in this record, and cannot be a basis for this decision. Summary dismissal of Flying Tigers' Complaint on the basis of factual assumptions rather than facts of record is clear error.

Furthermore, the absence of such facts is not a matter correctable by formal investigation as Pan Am has suggested. This is so because the existence of any such justification is expressly precluded by the limitations in Pan Am's tariff to one shipper only, excluding all other shippers to whom such justifying circumstances and conditions might also apply.

Nor can the Board correct the absence of facts in this record by reference to facts developed in other proceedings to which Flying Tigers was not a party. This elementary principle applies in all administrative proceedings requiring an evidentiary foundation. It applies with even greater force when there is involved, as here, the summary dismissal of a complaint at the very outset of a proceeding. At that point, the facts asserted by the complaint must be assumed to exist and the complaint dismissed only if it is without merit on those asserted facts.

Perhaps recognizing the flimsy and confused foundation of its decision the Board resorted to a different thrust. The Board finds fault because Flying Tigers "does not contest the Board's earlier determinations" involving reduced fares for military personnel moving domestically, *Certificated Air Carrier Military-Tender Investigation*, 28 C.A.B. 902 (1959) (Tr. 41). Flying Tigers was not a party to that proceeding and is in no position to contest the mere factual aspects of that decision. In any event these facts are irrelevant here; each case must stand on the facts peculiar to it.[1] As to the legal principles of the *Military-Tender* case they would, of course, be a matter for brief rather than complaint. However, the Complaint in stating an affirmative case against the impedimenta rates *sub silentio* has distinguished it from the case involving reduced fares for military personnel in a different market.

In this case, in its Complaint, Flying Tigers has set forth affirmatively the essential facts: that the Pan Am impedimenta rates are reduced rates solely for shipments by the Department of Defense; that there are no statutory restrictions, favoring the Department of Defense as shipper, upon the equality clause; that these reduced rates of Pan Am offer formidable competition for military shipments by Flying Tigers and that such rates undercut the rates for military shipments which Flying Tigers has set at the minima rates permitted by the Board. Since surface competition was not involved it was not referred to. Pan Am in its Answer does not dispute the facts as stated in the Complaint but states there are other cases of reduced rates and fares to the Government which may require considera-

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[1] In the *Military-Tender* case the compelling special "circumstances and conditions" related to the competitive injury to the airline industry from surface transportation at lower rates which had resulted in "the railroads' virtual monopoly." 28 C.A.B. 902, 907 (1959). No such circumstances are of record here—nor can they be imagined since there is no significant competition between ships and planes in the movement of military cargo overseas.

tion if the Board considers Flying Tigers' Complaint, and concludes that a hearing is required under Section 1002(f) even though the pertinent facts be undisputed.

In this posture of the record the Board properly could only do one thing—apply the equality clause to the undisputed facts and grant Flying Tigers' request for an order requiring Pan Am to discontinue its illegal rates forthwith. This the Board refused to do.

CONCLUSION

Pan Am's special impedimenta rates are illegal. Pan Am should be order to discontinue them forthwith.

Respectfully submitted,

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APPENDIX

Pertinent Provisions of The Federal Aviation Act, 72 Stat. 731 *et seq.*, As Amended, 49 U.S.C. § 1301 *et seq.*; and The Interstate Commerce Act, 24 Stat. 379 (1887), *et seq.*, As Amended, 49 U.S.C. § 1 *et seq.*

STATUTES REQUIRING EQUAL TREATMENT

Railroads

Special rates and rebates prohibited
Sec. 2 [49 U.S.C. § 2]

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transporation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. Feb. 4, 1887, c. 104, Pt. I, § 2, 24 Stat. 379; Feb. 28, 1920, c. 91, § 404, 41 Stat. 479; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Undue preferences or prejudices prohibited
Sec. 3 [49 U.S.C. § 3]

> (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port dis-

trict, gateway, transit point, region, district territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * *

Motor Carriers

Undue preferences and prejudices prohibited
Sec. 216(d) [49 U.S.C. § 316(d)]

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Water Carriers

Rates, fares, charges, and practices; through routes
Sec. 305(c) [49 U.S.C. § 905(c)]

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality,

region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or decription of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Freight Forwarders

Rates, charges and practices

Sec. 404(b) [49 U.S.C. § 1004(b)]

(b) It shall be unlawful for any freight forwarder, in service subject to this chapter, to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any carrier of whatever description.

Air Carriers

Observance of tariffs; granting of rebates
Sec. 403(b) [49 U.S.C. § 1373(b)]

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein....

Rates for carriage of persons and property; duty to provide service, rates, and divisions; discrimination

Sec. 404(b) [49 U.S.C. § 1374(b)]

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Pub.L. 85-726, Title IV, § 404, Aug. 23, 1958, 72 Stat. 760.

STATUTES RESTRICTING THE EQUAL TREATMENT REQUIREMENT

Railroads

Free transportation for passengers prohibited; exceptions; penalty

Sec. 1(7) [49 U.S.C. § 1(7)]

No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and pyhsicians

and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41-43 of this title. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; Apr. 13, 1908, c. 143, 35 Stat. 60; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 401, 41 Stat. 475; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 3(a), (b), 54 Stat. 900; June 24, 1948, c. 622, 62 Stat. 602; June 27, 1952, c. 477, Title IV, § 402(g), 66 Stat. 277.

Restrictions; quotations of rates for United States Government

Sec. 22 [49 U.S.C. § 22]

(1) Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of Veterans' Administration facilities or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 of this title reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from one place to another as a

result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; nothing in this chapter shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose or from carrying a disabled person accompanied by an attendant if such person is disabled to the extent of requiring such attendant, at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided*, That no pending litigation shall in any way be affected by this chapter: *Provided further*, That nothing in this chapter shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this chapter, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this title; and all the provisions of said section relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchaneable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or

receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section 10 of this title shall apply to any violation of the requirements of this proviso. Nothing in this chapter shall prevent any carrier or carriers subject to this chapter from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided*, That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this chapter shall be deemed to have violated the provisions of such chapter with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates.

(2) All quotations or tenders of rates, fares or charges under paragraph (1) of this section for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, shall be in writing or confirmed in writing and a copy or copies thereof shall be submitted to the Commission by the carrier or carriers offering such tenders or

quotations in the manner specified by the Commission and only upon the submittal of such a quotation or tender made pursuant to an agreement approved by the Commission under section 5b of this title shall the provisions of paragraph (9) of said section 5b apply, but said provisions shall continue to apply as to any agreement so approved by the Commission under which any such quotation or tender (a) was made prior to August 31, 1957 or (b) is on or after August 31, 1957 made and for security reasons, as hereinafter provided, is not submitted to the Commission: *Provided*, That nothing in this paragraph shall affect any liability or cause of action which may have accrued prior to August 31, 1957. Submittal of such quotations or tenders to the Commission shall be made concurrently with submittal to the United States Government, or any agency or department thereof, for whose account the quotations or tenders are offered or for whom the proposed services are to be rendered. Such quotations or tenders shall be preserved by the Commission for public inspection. The provisions of this paragraph requiring submissions to the Commission shall not apply to any quotation or tender which, as indicated by the United States Government, or any agency or department thereof, to any carrier or carriers, involves information the disclosure of which would endanger the national security. As amended July 27, 1956, c. 759, 70 Stat. 702; Aug. 31, 1957, Pub.L. 85-246, 71 Stat. 564; Sept. 2, 1958, Pub.L. 85-857, § 13(a), 72 Stat. 1264.

Motor Carriers

Deviation from rates and regulations enumerated in tariff forbidden; undue preferences

Sec. 217(b) [49 U.S.C. § 317(b)]

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through

any agent or borker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

Water Carriers

Tariffs and schedules

Sec. 306(c) [49 U.S.C. § 906(c)]

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this chapter or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: *Provided*, That the provisions of sections 1(7) and 22 of this title (which relate to transportation free and at reduced rates), together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

Freight Forwarders

Tariffs of freight forwarders

Sec. 405(c) [49 U.S.C. § 1005(c)]

(c) No freight forwarder shall charge or demand or collect or receive a greater or less or different compensation for or in connection with service subject to this chapter than the rates or charges specified therefor in its tariffs lawfully in effect; and no freight forwarder shall refund or remit in any manner or by any device any portion of the rates or charges so specified, or extended to any person any privileges or facilities in

connection with such service and affecting the value thereof except such as are specified in its tariffs: *Provided*, That the provisions of section 22 of this title (relating to transportation free or at reduced rates), insofar as such provisions relate to transportation or service in the case of property, shall apply with respect to freight forwarders, in the performance of service subject to this chapter, with like force and effect as in the case of the persons and service to which such provisions are specifically applicable.

Air Carriers

Observance of tariffs; granting of rebates
Sec. 403(b) [49 U.S.C. § 1373(b)]

. . . Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Boad may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,859

THE FLYING TIGER LINE INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In respondent's view, the questions presented are:

1. Whether the failure to include the government as a person specifically authorized by the Federal Aviation Act to receive free and reduced-rate transportation from air carriers denotes a congressional intent to prohibit the establishment of special tariff rates for military shipments appropriate to the nature of such traffic and the circumstances and conditions under which it is shipped.

2. Whether a tariff is unjustly discriminatory as a matter of law merely because it is limited to and provides special rates for military shipments.

3. Whether, after having specifically informed the Board that it did not desire a hearing, petitioner is entitled to assert error on the Board's part in dismissing petitioner's complaint without an evidentiary hearing, and, if so, whether such dismissal constituted an abuse of discretion.

I N D E X

CITATIONS

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*Cases chiefly relied upon are marked by asterisks

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Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Flying Tiger seeks review of an order of the Civil Aeronautics Board (E-20990, June 25, 1964, Tr. 39-42) dismissing, without a hearing, its complaint (Tr. 17-27) against a tariff filed by Pan American World Airways for Military Stores/Impedimenta. The tariff is limited to shipments moving on United States Government bills of lading (Tr. 8-11) for the Department of Defense (Tr. 5). It applies almost exclusively to foreign air transportation (see Section 101(21), infra, p. 39), [1/] and covers shipments carried on Pan American's

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1/ The only points covered by the tariff which do not constitute "foreign air transportation" are Guam Island, Wake Island, and Honolulu, Hawaii (Tr. 10, 11).

regularly scheduled services. It is Flying Tiger's contention that the tariff, being in terms limited to government shipments is unjustly discriminatory in violation of Section 404(b) of the Federal Aviation Act (infra, p. 42).

As an aid to understanding the present controversy, it will be useful to initially examine the Board's exercise of control over military rates in foreign air transportation, and the Board's past considerations of the question of unjust discrimination in connection with reduced rates for military shipments. The military constitutes the largest single shipper in foreign air transportation, and accordingly there is severe competition between carriers for military traffic. Because of the huge volume of revenue and traffic involved, the allocation of this traffic among carriers has a substantial impact on the development of the civil air transport system.[2/] However, unlike the situation which obtains with respect to transportation interstate and overseas (i.e., to territories and possessions, see infra, p. 39), the Board has no direct statutory authority to

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2/ It is because of this substantial impact that in 1960, the Department of Defense, at the instance of the President, and in cooperation with Congress and the Board, adopted a policy of increased utilization of commercial air services in a manner that would encourage and develop increased civilian air cargo capability, and would make available to the military a modern Civil Reserve Air Fleet (CRAF) capable of meeting defense requirements in emergencies. The policy included the awarding of contracts only to "Air Carriers" subject to Board regulatory control, and negotiating contract rates in accordance with tariffs filed and approved by the Board, and in accordance with Board economic policy. See, "Presidentially Approved Courses of Action as contained in the Department of Defense Report to the President on 'The Role of the Military Air Transport Service in Peace and War', February 1960" (Appendix I, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 87th Cong., 1st Sess., on Military Air Transportation (1961), June 19, 20, and 23, 1961, at 135-146).

fix rates in foreign air transportation. Rather, Section 1002(f) of the Act (infra, p. 44) restricts its direct powers over foreign rates to altering a rate only "to the extent necessary to correct . . . [unjust or undue] discrimination, preference, or prejudice" found to exist "after notice and hearing."

Nonetheless, the Board has been able to exercise indirect control over foreign rates through its power to approve agreements involving air carriers by which foreign rates are established under the machinery of the International Air Transport Association. 3/ The Board has also established minimum rates for military transportation not subject to IATA agreements by imposing such rates as a condition upon operating authority granted pursuant to exemptions under Section 416(b) of the Act (72 Stat. 771, 49 U.S.C. 1386(b)). 4/

Thus, the Board initially approved tariffs limited to government shipments of military impedimenta by approval in 1959 of an IATA agreement containing a commodity classification, with rates limited

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3/ The International Air Transport Association (IATA) is an organization of air carriers and foreign air carriers who establish international rates by agreement. These agreements must be filed with and approved by the Board for U.S. air carriers under Section 412 of the Act (72 Stat. 770, 49 U.S.C. 1382), and the bilateral agreements providing for air transportation services to foreign countries have a provision that rates set by IATA are subject to government approval.

4/ Such exemption may be required because the carrier's certificate does not include the points between which services are rendered for the military, or because additional operating authority otherwise is required.

to such shipments. In the planeload charter area, the Board in 1961 withdrew previously effective blanket military charter exemptions, and by regulation established minimum rate conditions to certain short-term military charter contract exemptions, and required specific application for longer term charter contract exemption, in which the specific rate could be examined.[5/] While rates for less than planeload shipments on regularly scheduled services are no longer established pursuant to the IATA machinery, the Board since 1963 has attached minimum rate conditions to Pan American's exemption authority to provide service to various air force bases.[6/] The level of Pan American's tariff rates here in issue, are in conformity with the

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5/ See Economic Regulations Part 288 (14 C.F.R. 288). See also, Capitol Airways v. Civil Aeronautics Board, 110 U.S. App. D.C. 262, 292 F.2d 755 (1961). Flying Tiger having no certificate authority for foreign air transportation, pursuant to Section 401(e)(6) of the Act (72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371(e)(6)) and the Board Regulations promulgated thereunder (see Economic Regulation Part 207, 14 C.F.R. 207) conducts only charter operations for the military in respect to shipments in foreign air transportation, and has in the past been subject to the minimum rates prescribed by the Board in connection with various exemptions granted to enable it to perform such operations.

6/ By Order E-20136, October 29, 1963, the Board initially attached minimum rate conditions upon renewal of an exemption authority granted Seaboard, Pan American and TWA for military cargo service between Dover and McGuire Air Force Bases and points in Europe. Prior to that time, in response to a complaint by Flying Tiger requesting revocation of these exemptions (see infra, pp. 6-7), the Board noted that comparison of the military impedimenta rates with the minimum rates set for one-way military charters was inappropriate because, unlike the military impedimenta rates, the charter rates took into account the absence of revenue on return flights (Order E-19046, November 29, 1962).

Board's most recent establishment of minimum rates in connection with renewal of such exemption. 7/

In addition to its continuing supervision over the level of rates for military services, the Board on several occasions has considered the question of unjust discrimination which allegedly results from approval of reduced rates for military shipments by the government. Its initial consideration of tariffs of this nature was in 1958, when there was filed with the Board for approval pursuant to Section 412 of the Act (72 Stat. 770, 49 U.S.C. 1382), an IATA agreement for international fares (see supra, note 3) containing a new commodity description for military stores/impedimenta, moving on U.S. Government bills of lading, substantially similar to Pan American's tariff here in issue. At the time this agreement was filed, there was pending before the Board the Military-Tender Investigation involving the question of the validity under Section 404(b) of an agreement between the airlines and the military providing, inter alia, a 10 percent discount from first-class fares for military and civilian personnel of military agencies traveling at government expense on an individually ticketed basis. The Board granted temporary

7/ By Order E-21465, October 30, 1964, the Board set minimum rate conditions on renewal of Pan American's exemption to serve various air force bases for service to Atlantic and Pacific points, which are no higher than the level of the rates contained in the tariffs here in issue. The Board noted that the rates in question were higher than some specific commodity rates established through IATA machinery, and also that the rates in the Pan American tariffs were at the minimum level which it had established in February, 1964.

approval of the IATA commodity classification pending determination of the Military-Tender Investigation, noting that its decision in that case would "presumably resolve the legal and policy framework within which we will decide similar questions [preferential rates for the government] raised by individual tariffs or agreements filed in the future."[8/]

The Board decided the Military-Tender Investigation in February, 1959 (28 C.A.B. 902 (1959)). It concluded that the military passenger fare discounts in issue were not unjustly discriminatory in violation of Section 404(b) of the Act, inasmuch as the circumstances and conditions surrounding military passenger transportation at government expense were substantially dissimilar to the circumstances surrounding the transportation of other passengers. Shortly thereafter, the Board approved without comment continuation of the IATA commodity classification applicable to government shipments of military stores and impedimenta.[9/]

In 1962, the Board again considered the validity of this type of commodity classification in connection with a complaint of Flying Tiger against Pan American tariffs substantially identical to those here in issue. The complaint urged, inter alia, that the tariff

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8/ Order E-12281, March 25, 1958; Order E-12809, July 18, 1958.

9/ Order E-13570, March 4, 1959.

was unjustly discriminatory. The Board dismissed the complaint stating in part:

> "We know of no principle requiring that each and every cargo rate bear precisely the same relationship to cost. On the contrary, airfreight rate structures historically have contained a range of rates depending on the commodities involved." 10/

It is in this context that Flying Tiger's complaint was filed with the Board. The complaint alleged that the Pan American tariff, being limited in terms to the government as a shipper, represented a classification of a shipper, not a commodity (Tr. 19), and as such was, as a matter of law, unjustly discriminatory in violation of Section 404(b) of the Act (see infra, p. 42) (Tr. 19-20, 24). It noted that Section 403(b) of the Act did not include the Federal Government among the classes of persons to whom free or reduced rate transportation might be provided, and urged that this omission demonstrated the unlawfulness of any special tariff rate for government shipments (Tr. 19, 22-24). 11/ The complaint further requested expedited treatment and summary disposition in that:

10/ Order E-19046, November 29, 1962. Subsequent to the order dismissing Flying Tiger's complaint, here on appeal, the Board once more reviewed the present Pan American tariffs in connection with renewal of its exemption authority to serve various military bases. It again noted that specific commodity rates were appropriate for this type of traffic (Order E-21465, October 30, 1964).

11/ Section 403(b) (infra, p. 41) provides that nothing in the Act shall prohibit air carriers from granting free or reduced-rate transportation to various specified classes of persons or property under regulations prescribed by the Board. Unlike the corresponding Section 22 of the Interstate Commerce Act (49 U.S.C. 22, Flying Tiger Br. p. 33), the United States Government is not set forth as one of the exempted classes.

> "There is no reason, need, or requirement for an evidentiary hearing. The issue posed is purely legal. It can be disposed of by brief to the Board, supplemented by oral argument if the Board or parties so desire." (Tr. 24).

Pan American's answer alleged that the Board had on many previous occasions specifically considered and approved special low rates for military impedimenta moving on U.S. Government bills of lading, and that such tariffs had become an established and accepted practice in air transportation (Tr. 30-33). It noted that any discriminatory aspects of its tariffs would be equally applicable to the many similar tariffs on file by other air carriers, including Flying Tiger's MATS charter rates which were well below commercial levels (Tr. 30, 33-34). The answer further alleged that the special tariff rates were not unjustly discriminatory inasmuch as they were justified by the totality of underlying facts and circumstances, including differences in cost, character of service, competitive necessity, benefit to the carriers, as well as other differences which serve to justify rates lower than those normally available to the public at large (Tr. 34-35). It urged summary dismissal inasmuch as the complaint had, contrary to the Board's Rules of Practice, wholly ignored these differences, and had not established unjust discrimination as a matter of law (Tr. 35-36).

The Board order here involved (Tr. 39-42) dismissed Flying Tiger's complaint. The Board noted that Flying Tiger had not challenged Pan American's tariff on grounds "other than that they are

illegal per se" (Tr. 42); that it had previously in the Military-Tender Investigation, after a full evidentiary proceeding, expressly held that discounts for military passenger travel were not unjustly discriminatory, inasmuch as "the circumstances and conditions surrounding official military travel were . . . substantially different from those prevailing in regular commercial travel" (Tr. 41); that it had for years approved special commodity tariff rates for government shipments as well as other government discount tariffs (Tr. 41); and inasmuch as the complaint did not "contest the Board's earlier determinations in this regard, no . . . attempt to distinguish the instant situation", that it was not persuaded that its earlier determinations required review, and that it would not therefore "at this time undertake a formal investigation looking to whether or not the subject rates of Pan American or the numerous other fares and rates currently applicable to military transportation are unjustly discriminatory" (Tr. 41-42). The Board expressed its interpretation of Sections 403(b) and 404(b) as follows:

> "Clearly the Act and the law generally require equality of treatment and preclude the offering of special fares or rates for special persons or shippers. It has been held, however, that special fares for certain categories of persons are not precluded merely because such persons are not listed in Section 403(b) of the Act, and that the anti-discrimination provisions of the Act are not violated when different fares or rates are offered to different persons in instances in which the conditions and circumstances of carriage are substantially dissimilar, or if such carriage is in fact not like and contemporaneous, or if there are substantial differences in the types of traffic to which the fares or rates are applicable." (Tr. 41).

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation and Interstate Commerce Acts principally involved are set forth in the Appendix, infra, pp. 39 to 45 . Other provisions of statutes or regulations are cited or quoted in their appropriate place in the text of this brief.

SUMMARY OF ARGUMENT

I

The failure to include the government among the persons specifically authorized by Section 403(b) of the Act to receive free and reduced rate transportation does not denote a congressional intention to preclude special tariff rates for government traffic appropriate to the nature and circumstances surrounding such shipments. Rather, the legislative history of the Civil Aeronautics Act demonstrates that the exclusion was intended only to maintain Board regulatory control over rates charged to the government as necessary under a susidized transportation system, a construction confirmed by the overall statutory plan. It has long been held that the exempted categories are "illustrative" not "exclusive", and reduced rates may be granted to other persons upon the filing of a tariff and justification of the reduction before the agency. Indeed, the post legislative history of the transportation acts demonstrates that Congress intended and expects the military to be granted appropriate special rates.

II

Section 404(b) does not require absolute equality among shippers, but rather prohibits only discriminations which are "unjust", i.e., where the transportation is a like service, of like traffic, under substantially similar circumstances and conditions. All reasonably relevant factors must be considered in determining if differences in these respects justify a rate differential, including shipper identity to the extent it reflects such differences. Under ordinary rate principles, a special commodity classification for military traffic is clearly justified, as the Board and the Interstate Commerce Commission have specifically found, and hence there is not involved "like traffic". Different rates for physically similar items under distinct rate classifications do not constitute unjust discrimination, and commodity classifications defined in terms of military shipments by the government are a familiar concept. Further justification may be found in the differing circumstances and conditions, such as lesser costs in handling military shipments, and the necessity for fare differentials to attract the traffic. Moreover, as has been recognized by the courts and the Board, the fact that the government is the shipper itself is another circumstance or condition material to the validity of a special rate for military shipments.

III

The Board was not required to hold a hearing on Flying Tiger's complaint in that only a question of law was presented, and Tiger specifically declared that it did not desire a hearing. Moreover, the Board has discretionary authority to dismiss even a legally sufficient complaint, and in view of the Board's unchallenged previous determinations and continuous surveillance of military rates, there was no abuse of discretion in dismissal of Flying Tiger's complaint without hearing.

ARGUMENT

Introduction

Petitioner's contentions essentially rest on the propositions (1) that the failure to include the government in the category of persons enumerated in Section 403(b) (infra, p. 41) to whom reduced-rate transportation may be given denotes, both generally and in contrast to the Interstate Commerce Act provision permitting reduced rates to the government, a congressional intent to preclude special tariff rates for government shipments, and (2) that under general rate-making principles, the Board in no circumstances can conclude that the government is entitled to a rate less than that charged to a member of the general public. The Board rejected both contentions, noting that special fares are not precluded merely because the person receiving them is not specifically listed in Section 403(b), that unjust discrimination exists only where different rates are charged for like and contemporaneous service in the transportation of like traffic under substantially similar circumstances and conditions, and that military shipments differ in these respects from shipments by the general public.

The discussion which follows will first examine the background of Section 403(b) which demonstrates that Congress intended to permit special tariff rates appropriate to the nature and circumstances surrounding government shipments, but subject to Board regulatory control. The second point will examine the nature and circumstances surrounding

military shipments which demonstrate that a special tariff rate is clearly justified. Finally, it will be shown that the Board did not abuse its discretion in dismissing Flying Tiger's complaint without a hearing.

I. By exclusion of the Federal Government from the categories of persons specifically authorized free and reduced-rate transportation in Section 403(b) of the Act, Congress did not intend to preclude special tariff rates for government shipments appropriate to the nature and circumstances surrounding such shipments

The government is not included in Section 403(b) (infra, p.41) as a person to whom carriers may grant reduced rates. That fact, however, by no means establishes that special rates may not be afforded to it. The persons listed in Section 403(b) are ones to whom Congress has given specific preferred treatment. As to other persons, tariffs for reduced rates may be filed and permitted if justification for the reduction is shown under established rate-making concepts. That this is the proper construction of the Act, and that special rates in air transportation can be afforded the government in appropriate circumstances through tariff filings, is clear from Supreme Court cases interpreting Section 22 of the Interstate Commerce Act (49 U.S.C. 22, Flying Tiger Br. p. 33); from the consistent administrative construction by the Board; from the legislative history; and from subsequent congressional studies of reduced rates for the government.

The Interstate Commerce Act provision, "That nothing in this act shall apply to the carriage, storage, or handling of property free or

at reduced rates for the United States, State, or municipal governments, . . ." appeared in the original Act of 1887 (24 Stat. 387). There is nothing in its legislative history to suggest any view on the part of the Congress that reduced rates otherwise could not have been afforded to the government or that the provision had any purpose beyond that of guaranteeing to the carrier the right to quote rates to the government without Commission interference. 12/

On the contrary, the Supreme Court recognized shortly after its enactment that the provisions of Section 22 were "illustrative" rather than "exclusive", and that reduced rates to the Federal Government might be authorized even if the Federal Government had not been specifically exempted under Section 22. Thus the Court, in I.C.C. v. Balt. & Ohio Ry. Co., 145 U.S. 263, 278 (1892), reversed a Commission determination that special rates could be accorded only to those categories of persons specifically enumerated in Section 22. It recognized that there would have been no point in forbidding "unjust" discrimination if all persons other than those specified in Section 22 were to be treated precisely alike. The court stated:

> ". . . the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It

12/ Prior to 1957, so-called "Section 22 quotations" were not even filed with the Commission. Section 22 was amended in that year to require such filings (71 Stat. 564). Even now the Commission holds that it lacks jurisdiction to declare rates contained in such government quotations either unreasonably low or discriminatory. Tennessee Products & Chem. Corp. v. Louisville & N.R. Co., 319 I.C.C. 497 (1963). See also, Atchison, Topeka & S.F.R. Co. v. Aircoach Transp. Ass'n, 102 U.S. App. D.C. 355, 253 F.2d 877, 881 (1958), cert. denied, 361 U.S. 930 (1960).

> does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States. . . ."

To the same effect, see Nashville, C. & St. L. Ry. v. Tennessee, 262 U.S. 318, 323 (1923).

Thus, at the time of the enactment of the Civil Aeronautics Act in 1938, it was established law that a regulatory provision specifying persons to whom free or reduced rate transportation might be given carried no connotation that other persons might not be given special rates if sufficient justification therefor was established before the regulatory agency.[13/] The Civil Aeronautics Act was largely modeled after the Interstate Commerce Act, and hence the prior construction of Section 22, known to the Congress, represents an appropriate guide to the construction of Section 403 (infra, p. 41).

13/ While the Civil Aeronautics Act of 1938 was superseded by the Federal Aviation Act of 1958, there was no change in the statutory provisions here involved. Further, the repeal of the Civil Aeronautics Act and the reenactment of the economic regulatory provisions in the Federal Aviation Act was for convenience in legislative draftsmanship, and the legislative history shows that Congress did not intend such repeal and reenactment to have any effect one way or the other on the appropriate construction of the economic regulatory provisions. See, House Report No. 2360, 85th Cong., 2d Sess., to accompany S. 3880, August 2, 1958, at pp. 10-11. See, to the same effect, Senate Report No. 1811, 85th Cong., 2d Sess., to accompany S. 3880, July 9, 1958, at p. 22; House Report No. 2556, 85th Cong., 2d Sess., to accompany S. 3880, August 12, 1958, at p. 90.

United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 480-81 (1932); United States v. Merriam, 263 U.S. 179, 187 (1923); Cornell Steamboat Co. v. United States, 53 F.Supp. 349, 355 (S.D.N.Y., 1943), aff'd, 321 U.S. 634 (1944).

Moreover, the Board from its inception has placed a similar interpretation upon the section. Thus, in Airline Pass Agreement, 1 C.A.A. 677, 679 (1940), the Board held:

> ". . . while the Act does not absolutely prohibit the granting of free or reduced-rate transportation to persons not described in the second sentence of section 403(b), it does prohibit the transportation of such persons (1) unless provision therefor has been made in the carrier's tariffs, or (2) if a violation of section 404 would result."

Indeed, this Court has affirmed a Board decision embodying the same conclusion.[14/] Further, as heretofore noted in the counterstatement, the Board consistently has applied this construction to permit special

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14/ See, Airborne Freight Corp. v. Civil Aeronautics Board, 103 U.S. App. D.C. 206, 257 F.2d 210 (1958), affirming the Board's second supplemental opinion in the Airfreight Forwarder Investigation, 24 C.A.B. 755, 758-59 (1957), in which the Board held that special rates for air freight forwarders could not be established by agreement, but noted that preferential rates might be established through tariff filings if justified in terms of significant differences in cost, service, or other relevant factors. Moreover, in Slick Airways v. United States, 292 F.2d 515, 518 (Ct. Cl., 1961), heavily relied upon by Flying Tiger, the court expressly approved the Board's construction permitting reduced rates to the government, provided only that a tariff was filed and the differential justified before the Board.

United States v. Associated Air Transport, Inc., 275 F.2d 827 (C.A. 5, 1960), the other case cited by Tiger, is not to the contrary. That case held only that when the Federal Government ships under a particular tariff it is bound by the provisions of that tariff in the same manner as any other shipper shipping pursuant to such tariff. The case had nothing whatsoever to do with the lawfulness of a special tariff rate, duly filed, which covers military shipments for the United States Government.

rates to the government. Accordingly, "the weight of the administrative construction falls into the scale." American Airlines v. Civil Aeronautics Board, 97 U.S. App. D.C. 324, 231 F.2d 483, 488 (1956).[15/]

The contention that the omission of the government from Section 403(b) represents a determination that under no circumstances can it be entitled to a special rate also is at variance with the over-all statutory plan. One of the principle criteria of public interest set forth by Congress in Section 102 of the Act (infra, p. 39) is national defense considerations. Further, under Section 416(b) (72 Stat. 771, 49 U.S.C. 1386(b)), the Board is authorized to exempt carriers from any requirement of the Act, and the Board can and has exempted carriers from the tariff provisions in relation to military shipments. See 14 C.F.R. 288; cf., Capitol Airways v. Civil Aeronautics Board, 110 U.S. App. D.C. 262, 292 F.2d 755 (1961).[16/] Moreover, Section 403(b) itself permits the Board, in respect of foreign and overseas transportation, to prescribe regulations permitting additional categories of free and reduced-rate transportation. The Board has done so in respect to both persons and property (see, e.g., 14 C.F.R. 223),

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15/ See, also, Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933); United States v. American Trucking Ass'ns., 310 U.S. 534, 549 (1940); American Airlines v. Civil Aeronautics Board, 178 F.2d 903, 909 (C.A. 7, 1949); P. Lorillard Co. v. Federal Trade Comm'n, 267 F.2d 439, 443 (C.A. 3, 1959), cert. denied, 361 U.S. 923 (1959).

16/ See, also, this Court's order of July 14, 1961 affirming the Board's exemption in United States Overseas Airlines v. Civil Aeronautics Board, Case No. 16,459. The exemption (Order E-17084, June 30, 1961) had granted Slick Airways the necessary authority to perform "Quicktrans" contract services for the military, at special rates.

and, in our view, Tiger erroneously contends that the Board's powers in this area are restricted to the transportation of persons.

There is nothing in the legislative history of the Civil Aeronautics Act which militates against the Board's construction. The failure to specify the government as a person to whom reduced-rate transportation could be given was not to preclude special tariff rates for government shipments. Rather, it was to avoid the incongruous situation in which carriers were subsidized in the form of air mail payments (the present Section 406(a), 72 Stat. 763, 49 U.S.C. 1376(a)) and at the same time allowed to increase their subsidy need through being permitted to quote uneconomic rates to the government. 17/ The congressional solution was to leave the question of appropriate

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17/ S. 2, the bill from which the Civil Aeronautics Act emanated, initially contained a provision for reduced rates for the government. It was omitted in the substitute S. 2 apparently in response to objections by the Interstate Commerce Commission. See, Hearings before a Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess., on S. 2, March, April, 1937, at pp. 7, 26, 38, 40-42, 48. The Commission had pointed out the difficulties which it had encountered in fixing fair and reasonable air mail rates under the Air Mail Act of 1934 (48 Stat. 933) in light of an amendment which granted authority to the Postmaster General to negotiate lower rates with air carriers in certain circumstances (49 Stat. 614). As to these difficulties, see Spencer, Air Mail Payment and the Government, 122-25 (1941). See, also, the statement of Clinton M. Hester, on behalf of the Interdepartmental Committee on Civil Aviation Legislation, which drafted the final bill, in which he noted that the provision for Postmaster General control over rates for the carriage of foreign mail (the present Section 405(f)(1), 72 Stat. 760, 49 U.S.C. 1375(f)(1)) had been included "to prevent air carriers from entering into arrangements with foreign countries for the carriage of their mail at very low rates of compensation, anticipating that their losses from this traffic would be made up by increased mail subsidy from the United States." Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 3d Sess., on H.R. 9738, March, April, 1938, at p. 43.

rates for the government to the Board's determination under the tariff filing requirements of the Act. A provision such as Section 22 would have enabled the carriers to grant reduced rates to the government completely free of regulatory control.

Further, if any one fact is clear from the post-legislative history, it is that the Congress expects the military to be accorded such special rates as are found by the Board and other regulatory authorities to be consistent with applicable statutory provisions and purposes. Recent congressional studies of preferential government transportation rates, and the effect of the exemption of Section 22 of the Interstate Commerce Act, confirm the construction of the transportation acts as permitting special tariff rates for government shipments when filed as a tariff, and justified before the regulatory agency, irrespective of whether there is a specific exemption. One such study arose from an ICC proposal to amend the Section 22 government exemption, to be applicable only in times of war or national emergency. In 1957, Congress rejected the amendment, finding that no need had been shown therefor, and that the needs and exigencies of military shipments were so different from the needs of commercial shippers that a special method of establishment of appropriate rates was required. But contrary to Flying Tiger's inference (Br. pp. 20-21), the Senate Report recognized that, even without the Section 22 exemption, government shipments, particularly military, by reason of their volume and peculiar nature, should move at special commodity rates rather than being required

to be shipped under the higher class rates, the latter normally being confined to occasional or sporadic movements of traffic.[18] The report specifically recognized the appropriateness of a special published tariff applicable to government shipments, in concluding:

> "As a matter of Government policy, the carriers should be given opportunity under ordinary circumstances to exercise their managerial discretion, either to publish rates applicable on Government traffic in tariffs, or to issue them under section 22." [19]

A further extensive study of the question of appropriate rates for government shipments and exemption from the tariff publication requirements of the transportation acts was made by a special study group set up by congressional resolution in 1958. The preliminary draft report of this special study group, issued in January 1961, recommended that the exemption for government shipments in Section 22 of the Interstate Commerce Act should be repealed, but further proposed that the repeal should not take effect for a period not to exceed one year, in order to permit the government agencies to negotiate and establish published tariff rates which would be appropriate

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18/ Senate Report No. 410, 85th Cong., 1st Sess., to accompany S. 939, June 6, 1957, 1957 U.S. Code, Cong. & Admin. News 1782, 1784-85. See, also, comments on S. 939 by the Comptroller General (February 19, 1957), the General Services Administration (April 15, 1957), the Department of the Army (April 9, 1957), and the Secretary of Commerce (May 15, 1957), Hearings before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, U.S. Senate, 85th Cong., 1st Sess., on S. 377, 378, 937, 939, 943, April 16-22, 25, 1957, at 8-9, 12-14, 19-22, and 27, respectively, wherein it is also clearly recognized that government shipments are of a nature that require special commodity rates.

19/ 1957 U.S. Code, Cong. & Admin. News 1786.

to the large volume movements of government shipments. The report specifically recognized that, absent an exemption, government traffic should normally be accorded special commodity tariff rates by reason of the volume of shipments, rather than being required to move at the higher class rates, but concluded that there was no reason that the establishment of such rates should not be by published tariffs justified before the regulatory agency involved, as opposed to negotiation outside the regulatory scope of the agency. 20/ Thus, the report concluded:

> "If Section 22 were repealed, therefore, it might be desirable to continue existing quotations in force for a stated period -- possibly six months or a year -- to permit the Government agencies to justify exception or commodity rates for all or part of its traffic that is moving on Section 22 rates." 21/

In the period 1958 through 1963, the Military Subcommittee of the Committee on Government Operations of the House of Representatives made an exhaustive study of the military air transportation policies of the Military Air Transportation Service. As a result of this study and through the cooperation of the President, the Department of Defense and the Civil Aeronautics Board, the Military Air Transport Service adopted a policy of increasing utilization of scheduled

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20/ National Transportation Policy, Preliminary Draft of a Report Prepared for the Committee on Interstate and Foreign Commerce, United States Senate, by the Special Study Group on Transportation Policies in the United States, 87th Cong., 1st Sess., January 3, 1961 (Committee Print), at 498-99, 501, 504, 506.

21/ Id. at 504.

and charter operations of air carriers under the regulation of the Civil Aeronautics Board, subject to the establishment of minimum economic rates by the Board.[22] The tenth report of the Committee, in 1963, noted approval of establishment of minimum rates by the Board as being beneficial to both the airline industry and the military establishment, but, although aware of the fact that the rates were already below commercial levels, it recommended that the Board consider further reductions.[23]

Thus, it is clear that Congress' intention both at the time of the original enactment of the Civil Aeronautics Act, and continuing to date, is that rates for government shipments should be subject to Board regulatory control, and accordingly should not be exempted under Section 403(b) of the Act; but that military traffic shipped for the Department of Defense, because of its unique nature and the circumstances surrounding its shipment, should be entitled to transport at

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22/ See Appendix I to Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 87th Cong., 1st Sess., June 19, 20, and 23, 1961, on Military Air Transportation, "Presidentially Approved Courses of Action, as contained in the Department of Defense Report to the President, 'The Role of the Military Air Transport Service in Peace and War,' February 1960," at pp. 135-46.

23/ House Report No. 559, "Military Air Transportation - 1963," 88th Cong., 1st Sess., July 17, 1963, at 6-7, 9. See, also, 1961 Subcommittee Hearings, id., at 92-98, wherein concern was expressed that the established minimum rates, which were already well below commercial levels (House Report No. 559, supra, at 37), might result in exhorbitant or windfall profits, which would not conform with the Board's obligation under Section 102(a) of the Act (infra, p. 39) to promote the national defense. Indeed the Committee had specifically noted that Flying Tiger's special government air-surface tariff (see, infra, note 34) established rates lower than available to the general public. Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 88th Cong., 1st Sess., April 24, 25, 30, 1963, on Military Air Transportation - 1963, at p. 73.

rates less than other commercial shipments; and that the Board, in fixing rates or considering tariffs, should take into consideration these differences which justify lower rates. In sum, as this Court recognized in Capitol Airways v. Civil Aeronautics Board, 110 U.S. App. D.C. 262, 292 F.2d 755, 758 (1961) with respect to the operating authority and tariff exemptions there involved, while Congress could have given "all firms engaged in air transportation the broad privilege of doing business with the military establishment, free of all restrictions imposed by other provisions of law," it instead "delegated to the Board the authority" to determine which carriers should transport for the government and the conditions of the carriage.[24/]

II. Rates applicable only to shipments by the government of military stores and impedimenta are not per se unjustly discriminatory in that such shipments may not be of a "like kind of traffic" or made under substantially similar circumstances and conditions than shipments by the general public

If wrong in the view that Congress affirmatively intended that the government not receive special rates in air transportation, nonetheless, says petitioner in effect, Congress did not intend that the

24/ The congressional policy of providing for shipment of government property at the lowest possible rate, is so pervasive that the Supreme Court has held that any State regulatory policy which interferes with this overriding congressional policy, though limited to intrastate commerce, constitutes a violation of the supremacy clause of the Constitution. United States v. Georgia Public Service Comm'n, 371 U.S. 285 (1963); Public Utilities Comm'n of Cal. v. United States, 355 U.S. 534 (1958). Compare, Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943).

government be accorded more favorable treatment than any other shipper, and consequently Pan American's tariff must be judged in the light of the general rate standards of the Act. In petitioner's view, the prohibition against unjust discrimination requires absolute equality between all shippers, and since Pan American's tariff in terms is restricted to military shipments, this restriction violates the so-called rule of equality and discriminates against private shippers of physically similar items.

But Section 404(b) (infra, p. 42) does not provide a rule of absolute equality among shippers, but rather prohibits only those discriminations which are found by the Board to be "unjust".[25/] Discriminations are not "unjust" where service is not "like and contemporaneous," where the transportation is not of a "like kind of traffic," or where it is not under "substantially similar circumstances and conditions."[26/] Moreover, in determining whether any of these conditions exist which may warrant special rates, the

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25/ Whether or not discriminations in particular instances are deemed to be "unjust" has been held to be primarily a question of fact and policy to be determined by the administrative agency charged with enforcement of the Act, in accordance with its expertise. Eastern Central Motor Carriers Ass'n v. United States, 321 U.S. 194, 210-12 (1944); I. T. Barringer & Co. v. United States, 319 U.S. 1, 6 (1943); Nashville C. & St. L. Ry. v. Tennessee, 262 U.S. 318, 322 (1923).

26/ Although the term "unjust discrimination" is undefined in Section 404(b) of the Federal Aviation Act, the Board has followed the definition of that phrase as contained in Section 2 of the Interstate Commerce Act (infra, p.45), which in terms has applicability only when these three conditions are met. Military-Tender Investigation, 28 C.A.B. 902, 905 n. 9 (1959); Summer Excursion Fares, 11 C.A.B. 218, 222-23 (1950); cf. I.C.C. v. Baltimore & Ohio Ry. Co., 145 U.S. 263, 282 (1892).

agency is not, as Tiger infers, required to limit its consideration solely to matters directly relating to the actual carriage of the property. Rather, the Board may consider all reasonably relevant factors, including the welfare of the carriers and the public, as well as the interest of shippers, in determining whether a differential in rates constitutes unjust discrimination, and to the extent that the identity of the shipper has bearing on these factors or the conditions of carriage, that too may be taken into account.[27/] That is the interpretation placed on the Act by the

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27/ In Texas & Pac. Ry. v. I.C.C., 162 U.S. 197, 219 (1896), the Supreme Court refused enforcement of a Commission order declaring differentials in rates between imported and domestic goods to be unjustly discriminatory, stating:

> "The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the Act. . . we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust'."

And in Eastern Central Motor Carriers Ass'n v. United States, 321 U.S. 194, 207 (1944), the Supreme Court reversed the Commission's summary application of a policy adopted for the railroads to the trucking industry, noting that consideration could not be confined to only the conditions of actual carriage in this situation, and that intercarrier competition must be taken into account. The court also noted that:

(footnote continued)

Board in Military-Tender Investigation, 28 C.A.B. 902 (1959), and special rates for military traffic find support in general case law.

In the first place, such special rates may be justified as a special commodity classification, and accordingly as not constituting "like traffic". The Interstate Commerce Commission has long held that Section 2 of the Interstate Commerce Act (infra, p.45), the anti-discrimination provision, was not intended to be applicable to kindred commodities shipped under distinct rate classifications, though the commodities be physically similar in general appearance and their actual transportation done in a substantially similar manner. 28/

> "Each form of transportation presents, by reason of its peculiar operating conditions, its own problems for the function of rate making. And each, by virtue of competition with others, presents additional complications arising from the varied circumstances of their operation."

Accordingly, the Board is free to reach its own determinations in this area in the light of conditions peculiar to air transportation.

The Supreme Court has recently recognized some of the many considerations which may be taken into account in rate making and classifications. See, All States Freight, Inc. v. N.Y., N.H. & H. R.R. Co., ___ U.S. ___, 33 L.W. 4051, 4052 (December 14, 1964).

28/ See, e.g., Board of Trade of City of Chicago v. C. & A. R.R. Co., 27 I.C.C. 530, 534-35 (1913) (different rate classification between wheat and other coarse grains where the transportation was done in a similar manner); Washington Building Lime Co. v. Arcade & A.R. Corp., 174 I.C.C. 577, 579-80 (1931) (different rate classifications between agricultural, chemical and building lime, though allegedly coming from the same bin); Curry & Whyte Co. v. D. & I. R.R.R Co., 32 I.C.C. 162, 168 (1914) (different rate classification between saw logs and pulp wood though cut from same stumpage by same owners and shippers). And see, Willamette Iron & Steel Works v. Baltimore & O. R.R. Co., 25 F.2d 522, 523 (D.C. Ore., 1928), aff'd, 29 F.2d 80 (C.A. 9, 1928), wherein the court refused to enforce a Commission reparation order permitting steel plates substantially identical to those used in ship building to be charged under a rate classification for ship steel plates rather than a higher tariff classification for other steel plates, holding that the ship plate classification was distinct from the classification for other steel plates, and was applicable only to steel plates intended for use in ship construction.

The Commission has also recognized that "the traffic of the Army and that of other shippers is not 'like traffic' within the meaning of Section 2 of the Act. . . ." Patterson v. Aberdeen & R.R. Co., 266 I.C.C. 45, 52 (1946), aff'd on reconsideration, 293 I.C.C. 219 (1954); U.S. of America v. A. & R.R. Co., 269 I.C.C. 141, 144 (1947), remanded on other grounds, 91 U.S. App. D.C. 178, 198 F.2d 958 (1952), aff'd on reargument, 294 I.C.C. 203 (1955). Similarly, the Board specifically noted the appropriateness of a special commodity rate applicable to military shipments in its 1962 order dismissing Flying Tiger's complaint against similar Pan American tariffs (Order E-19046, November 29, 1962), a conclusion reaffirmed in October, 1964 (Order E-21465, October 30, 1964) (see supra, pp. 6-7). And it initially approved such a commodity classification in 1959, by approval of the IATA agreement containing such a classification (see supra, pp. 5-6).[29]

Thus, a special commodity classification for military traffic may be justified by the many factors normally considered in classification of commodities,[30] such as the nature of the materials;[31] the total volume of the aggregate of the government shipments;[32]

29/ As previously noted, congressional reports also recognize that military traffic should be accorded special treatment.

30/ See, All States Freight, Inc. v. N.Y., N.H. & H. R.R. Co., supra, note 27.

31/ See cases cited supra, note 28.

32/ Russellville Compress Co. v. G., M. & R.R. Co., 120 I.C.C. 481, 485 (1926); Samuel v. Director General, 59 I.C.C. 190, 191 (1920); Peru Plow & Wheel Co. v. C., M. & St.P. Ry. Co., 142 I.C.C. 456, 458 (1928).

and the paramount public interest in facilitating military shipment at the lowest feasible economic rate.[33/] The fact that other shippers may be unable to utilize the Pan American services for shipment of physically similar items at the same rate should no more render the tariff classification invalid than does the fact that a particular shipment may not fall within other classifications of similar property. Also, a tariff applicable only to military property moving under government bills of lading is merely the familiar definition of the classification, rather than a differentiation between shippers.[34/]

33/ In, Investigation and Suspension Docket 26 to 26C (Lake Cargo Coal Case), 22 I.C.C. 604, 623 (1912), the Commission noted that, "In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds."

34/ The limitation in the tariff to government shipments for the Department of Defense simply serves to define the classification in accordance with the differing circumstances and conditions surrounding the shipment which had justified the special tariff rate. Tariffs restricted to shipments under government bills of lading are commonplace.

Thus, in United States v. A. & V. Ry. Co., 40 I.C.C. 405 (1916), the ICC, recognizing that lower rates could be negotiated pursuant to Section 22, established a tariff providing maximum rates for stamped postcards and similar items shipped under government bills of lading. And for years both the rail and motor carriers have had on file with the ICC military impedimenta tariffs limited to shipments under government bills of lading which are very similar to those here in issue. (Uniform Freight Classification 7, ICC A-7, Item 69050, issued jointly by Traffic Executive Association-Eastern Railroads, Southern Classification Committee, Western Classification Committee and Illinois Freight Association, Agents; National Motor Freight Classification A-7, MF-ICC 5, Item 137300-04, issued by National Motor Freight Association, Inc., Agent.) Indeed, many air carriers (including

(footnote continued)

Furthermore, special rates may be justified for military traffic because it is not transported under "substantially similar circumstances and conditions" as non-military traffic. As the Board noted in Military-Tender Investigation, 28 C.A.B. 902 (1959), there are significant differences. One is that the costs of transporting the traffic may be less due to the volume of the military shipments and the absence of expenses associated with other traffic such as the handling of many shipments, advertising, and the like. Another is that the military traffic is "sensitive to slight fare differentials," and the rate level may be the decisive factor in determining whether the traffic will move by air or surface transport (28 C.A.B. at p. 908).[35/]

Accordingly, whether special rates for military traffic are viewed as a special commodity classification or as shipments under

Flying Tiger) and surface carriers have on file with both the Board and the ICC, Joint Air-Surface Military Impedimenta tariffs limited to shipments under government bills of lading. (See, e.g., Official Air-Surface Military Rate Tariff No. 1, by Flying Tiger Line, Inc., and individual surface carriers, MF-ICC No. 6, CAB No. 5, issued by Reed B. Schlipp, Agent (formerly Robert L. Brunner, Agent).)

35/ Section 1002(e) of the Act (infra, p. 43) specifically provides as a criteria in rate making, "the effect of such rates upon the movement of traffic." See, also, Texas & Pac. Ry. v. I.C.C., 162 U.S. 197, 218 (1896), where the Supreme Court specifically recognized that the necessity of reducing rates to obtain traffic was a circumstance which justified a rate differential. The possible loss of traffic noted in the Military-Tender Investigation was to the railroads. Here, it could be to MATS, the military airline, or to water transport. Indeed, Tiger's purpose in instituting this suit is to aid in forcing the traffic to move via its planeload charter service for MATS. But the discrimination provisions were intended for the protection of shippers, not other carriers. See I.C.C. v. Balt. & Ohio Ry. Co., 145 U.S. 263, 281 (1892). There is no injury to any shipper arising from Pan American's tariff.

different circumstances and conditions, the fact that the shipments are by the government obviously is a factor for consideration if only because of the differences heretofore noted between the government's shipments and those of private persons. Further, even in non-governmental situations, the identity of the shipper may be taken into account to the extent that identity has bearing on the circumstances and conditions of the carriage.[36/] Since there were distinctions

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36/ In Slick Airways, Inc. v. United States, 292 F.2d 515, 518 (Ct. Cl., 1961), the court adopted the Board's construction of Section 404(b), noting that reduced rates might be accorded to the government if a tariff was filed, and circumstances and conditions surrounding the shipments were substantially different from those of private shipments. And early in its history the Interstate Commerce Commission held lawful special reduced rates to immigrants noting that they were a readily distinguishable class, transported under substantially different circumstances and conditions than other persons, without injury to anybody. James C. Savery & Co. v. N.Y. Cent. & H. R.R. Co., 2 I.C.C. 338, 358 (1888).

Also, in the non-governmental situation, different rates to different shippers are unlawful only where there are no relevant dissimilar circumstances other than mere identity. Thus, in L. T. Barringer & Co. v. United States, 319 U.S. 1, 6 (1943), relied upon by Flying Tiger, the Supreme Court said:

> "Sec. 2 is aimed at the prevention of favoritism among shippers. . . . Where the transportation services are rendered under substantially similar conditions the section has been thought to prohibit any differentiation between shippers on the basis of their identity. . . . But differences in rates as between shippers are prohibited only where the 'circumstances and conditions' attending the transportation service are 'substantially similar'. Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether on the other hand, the difference in the rates constitutes an unjust discrimination because based primarily on considerations relating to the identity . . . of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination."

between government and private shipments, the Board in the Military-Tender Investigation found it unnecessary to rest its determination that special rates could be given to the government "upon any theory that the Federal Government may be granted discriminatory rate concessions without any explicit provision therefor in the Federal Aviation Act" (28 C.A.B. at p. 911). Rather, said the Board (28 C.A.B. at p. 912):

> ". . . the fact that the Federal Government is the recipient of the discriminatory military fare discount is itself another circumstance or condition material to the issue of the validity of the discount."

The Court need go no further here. We note, however, that it has long been recognized by the courts that the government, by reason of its unique nature, is not in the same position as private shippers. Thus, in I.C.C. v. Balt. & Ohio Ry. Co., 145 U.S. 263, 278 (1892) (quoted supra, pp. 15-16), the court indicated that the government might be entitled to reduced rates, even if not specifically exempted under Section 22 of the Interstate Commerce Act. See, also, Emergency Fleet Corp. v. Western Union, 275 U.S. 415, 425 (1928). Such a view, we think, can be supported through a recognition that there may be essential differences in circumstances and conditions of shipment arising from the very fact that the government is the shipper. No other shipper is in the same situation as the government.[37/] The

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37/ See, New York Telephone Co. v. Siegel-Cooper Co., 202 N.Y. 502, 96 N.E. 109, 112 (Ct. App. N.Y., 1911); Kansas City Southern R. Co. v. Pub. Serv. Comm., 225 La. 399, 73 So. 2d 188, 190-91, 5 PUR 3d 399, 342-43 (Sup. Ct. La., 1954); Tennessee Products & Chem. Corp. v. Louisville & N.R. Co., 319 I.C.C. 497, 503 (1963).

government is not in competition with anyone in the discharge of its military functions. No other shipper is injured or prejudiced in any way by a special rate for military shipments since they are completely out of the normal stream of commerce, and are non-competitive with all other commodities, regardless of the particular nature of the specific items shipped. 38/

In sum, a tariff providing a special rate for military traffic moving by air plainly is not unlawful per se. Such a tariff is not incompatible with various decisions relied upon by Tiger holding or suggesting that the mere identity of a shipper, or the ownership of the goods, is not a circumstance or condition justifying a rate differential. The cases cited by Flying Tiger have no application to the present issue. They did not concern a question involving the government as a shipper, and hence no consideration was given to the inherent differences in circumstances and conditions arising from the distinction between it and private persons as shippers. Moreover, the cases involved situations where the identity of the shipper or ownership of the goods was, by itself, urged as the justification for its different treatment, the Commission having found that there were no other differences in circumstances and conditions

38/ See, Leigh Banana Case Co. v. Director General, 59 I.C.C. 113, 116-17 (1920); Pa. Millers' State Asso. v. Phila. & R. Ry. Co., 8 I.C.C. 531, 551 (1900).

involved sufficient to justify a difference in rates.[39]

III. There was no error in the Board's dismissal of the complaint without formal investigation and hearing

Flying Tiger also argues that even if the Board was correct in its determination that the tariff was not per se unlawful because limited solely to government shipments, the Board nonetheless could not dismiss its complaint without a full-scale investigation and evidentiary hearing to determine if there was in fact involved a like kind of traffic or substantially dissimilar circumstances and conditions. There are several answers to this contention.

In the first place, Tiger did not raise any issue of fact before the Board, but rather relied solely on a proposition of law.[40] Additionally, rather than requesting a hearing, Tiger stated that it did not desire a hearing by declaring:

> "There is no reason, need or requirement for an evidentiary hearing. The issue posed is purely legal. It can be disposed of by brief to the Board, supplemented

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39/ Tiger places principal reliance on I.C.C. v. Delaware, L. & W.R. Co., 220 U.S. 235 (1911), and I.C.C. v. Balt. & Ohio R. Co., 225 U.S. 326 (1912). The Delaware case involved a situation in which a carload rate was denied to freight forwarders in circumstances in which the Commission had found that there were no other differences in circumstances and conditions which warranted the distinction. Similarly, the Commission had found in the B & O case that no distinctions existed which justified different rates for the transportation of coal intended for railroad use and other coal.

40/ To the extent that Flying Tiger claims factual issues were "implicit" or raised "sub-silentio" in the complaint, conformity to the Board's rules of practice is lacking, in that a complaint is required to state the reasons why a fare or classification is unlawful, "and shall support such reasons with a full factual analysis." (Procedural Regulations Part 302.502, 14 C.F.R. 302.502).

> by oral argument if the Board or parties so desire." (Tr. 24).

Thus, Tiger is in no position to complain because the Board did not hold a hearing. 41/

In any event, the Board is not mandatorily required to hold hearings upon complaints, but rather has discretionary authority in this respect. Section 1002(a) (infra, p. 42) provides in part: "Whenever the . . . Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing." This provision permits dismissal of even a legally sufficient complaint. See, Flight Engineers Int'l Ass'n, EAL Chap. v. Civil Aeronautics Board, ___ U.S. App. D.C. ___, 332 F.2d 312, 314-15 (1964); Nebraska Department of Aeronautics v. Civil Aeronautics Board, 298 F.2d 286, 295 (C.A. 8, 1962); Pan American-Grace Airways v. Civil Aeronautics Board, 85 U.S. App. D.C. 297, 178 F.2d 34 (1949); Air Transport Associates v. Civil Aeronautics Board, C.A.D.C. No. 10914, decided November 23, 1951 (not reported). In Air Transport Associates, this Court affirmed without opinion a Board order dismissing a complaint by a competitor against the rates of another carrier

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41/ Section 1006(e) of the Act (infra, p. 44) provides in part:

> "No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so."

despite the contention there made that the Board was required to proceed to a hearing on the complaint. In the light of the Board's previous exhaustive study of the question here involved, and its continuous scrutiny, evaluation, and approval of tariffs identical to those here in issue (see counterstatement), it is clear that there was no abuse of discretion in declining to relitigate previously determined factual issues which were not even challenged in the complaint. 42/

42/ The complaint having made no attempt to distinguish the Pan American tariffs from similar tariffs and other preferential rates to the government which had for years been approved by the Board, any issue of factual differences in these tariffs, which would render the Board's previous determinations inapplicable, was not before the Board, and may not be raised on this appeal. See, F.P.C. v. Colorado Interstate Gas Co., 348 U.S. 492, 497-99 (1955); Nebraska Department of Aeronautics v. Civil Aeronautics Board, 298 F.2d 286, 293 (C.A. 8, 1962); North Central Airlines v. Civil Aeronautics Board, 108 U.S. App. D.C. 185, 281 F.2d 18, 23 (1960); New England Air Express v. Civil Aeronautics Board, 90 U.S. App. D.C. 215, 194 F.2d 894-95 (1952); Seaboard & Western Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 78, 183 F.2d 975 (1950).

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

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December, 1964

APPENDIX

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 et seq.)are:

TITLE I - GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires--

* * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively--

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * *

DECLARATION OF POLICY: THE BOARD

Sec. 102 [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest

degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * *

TITLE IV - AIR CARRIER ECONOMIC REGULATION

* * * * *

TARIFFS OF AIR CARRIERS

Filing of Tariffs Required

Sec. 403. [72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. 1373] (a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

Observance of Tariffs; Rebating Prohibited

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

* * * * *

RATES FOR CARRIAGE OF PERSONS AND PROPERTY

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404. [72 Stat. 760, 49 U.S.C. 1374] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers;

to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Discrimination

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * *

TITLE X - PROCEDURE

* * * * *

COMPLAINTS TO AND INVESTIGATIONS BY THE ADMINISTRATOR AND THE BOARD

Filing of Complaints Authorized

Sec. 1002. [72 Stat. 788, 49 U.S.C. 1482] (a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his offcial duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary

shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

* * * * *

Power to Prescribe Rates and Practices of Air Carriers

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: Provided, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge.

Rule of Ratemaking

(e) In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors --

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Removal of Discrimination in Foreign Air Transportation

(f) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge or enforcing any such discriminatory. preferential, or prejudicial classification, rule, regulation, or practice.

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

The relevant provision of the Interstate Commerce Act (49 U.S.C. 1, et seq.) is:

CHAPTER 1 - INTERSTATE COMMERCE ACT,
PART I; GENERAL PROVISIONS AND
RAILROAD AND PIPE LINE CARRIERS

* * * * *

Special Rates and Rebates Prohibited

Sec. 2 [24 Stat. 379 (as amended by 41 Stat. 479, 48 Stat. 1102, 49 Stat. 543), 49 U.S.C. 2] If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

REPLY BRIEF FOR PETITIONER THE FLYING TIGER LINE INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,859

THE FLYING TIGER LINE INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

On Petition for Review of Order of the Civil Aeronautics Board

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REPLY BRIEF FOR PETITIONER

I

REPLY TO RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent's counterstatement of the questions presented, which in turn provides the structure for its Brief, misstates the questions presented to the Court by this Petitioner. In so doing, Respondent avoids the issues presented in and dispositive of this case.

The first question presented by Respondent poses a question which is so sweeping as to be capable of rebuttal, of course, but also so sweeping as to be meaningless. According to Respondent, it is Petitioner's position that Congress intended "to prohibit the establishment of special

tariff rates for military shipments appropriate to the nature of such traffic and the circumstances and conditions under which it is shipped". Petitioner has made no such sweeping assertion. As indicated in Petitioner's statement of questions presented, Petitioner does not assert that each and every instance of different rates to different shippers constitutes unlawful discrimination. Petitioner asserts only that unlawful discrimination exists where such different rates apply to the contemporaneous transportation of like cargo by like means under substantially similar circumstances and conditions.

The second question presented by Respondent is equally at variance with the question actually presented on this appeal. The question is not "whether a tariff is unjustly discriminatory as a matter of law *merely* because it is limited to and provides special rates for military shipments". (Emphasis supplied) The question is instead whether a tariff is unjustly discriminatory where the *only* difference is that it applies to the military as the shipper.

Petitioner's third question, viewed at best, merely introduces a variety of subsidiary questions as to the nature of the proceedings before the Board, the positions of the parties, and the Board's methods which are discussed further below. If, and to the extent that the question assumes an express waiver by the Petitioner of a hearing (which the phrasing of the question strongly suggests) that assumption is false as a matter of fact. (Pet. Br. 21-26; *infra,* p. 19)

II

REPLY TO RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Respondent's counterstatement of the case is essentially a summary of the Board's actions over a period of years in permitting or approving reduced rates for the United States Government as a shipper. The repetition of these instances of Board action is employed here, and again

elsewhere in Respondent's Brief, for the expressly avowed purpose of justifying the Board's action challenged herein (Board Br. 18). These instances of Board action, where the questions here posed were never considered or determined in subsequent judicial review, are wholly irrelevant and certainly are not controlling in this first instance of judicial review. As Mr. Justice Stone said in *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 511 (1930):

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See Louisville & N. R. Co. v. United States, 282 US 740, ante, 672, 51 S Ct. 297.

The Board's strategem should be recognized for and treated as it is—a "bootstrap" operation.

III

RESPONDENT'S ARGUMENT, THAT THERE MAY BE CIRCUMSTANCES IN WHICH DIFFERENT RATES TO DIFFERENT SHIPPERS DO NOT CONSTITUTE UNLAWFUL DISCRIMINATION, IS AIMED AT AN IMAGINARY CONTROVERSY

The first point in Respondent's argument, and the cases cited in support thereof, amount merely to the proposition that there *may be* circumstances which could justify differences in rates to different shippers. Respondent repeatedly makes the assertion, and cites cases to the effect that (emphasis supplied):

> . . . reduced rates may be granted to other persons upon the filing of a tariff and *justification of the reduction before the agency.* (p. 10)

> As to other persons, tariffs for reduced rates may be filed and permitted *if justification for the reduction is shown* under established rate-making concepts. (p. 14)

> . . . other persons might . . . be given special rates *if sufficient justification therefor was established* before the regulatory agency (p. 16)
>
> . . . while the Act does not absolutely prohibit the granting of free or reduced-rate transportation to persons not described in the second sentence of section 403(b), it does prohibit the transportation of such persons . . . (2) if a violation of section 404 [the anti-discrimination section] would result. (p. 17, quoting from *Airlines Pass Agreement*, 1 C.A.A. 677, 679 (1940))
>
> . . . preferential rates might be established through tariff filings *if justified in terms of significant differences in cost, service, or other relevant factors.* (fn. p. 17 referring to *Airborne Freight Corp.* v. *Civil Aeronautics Board*, 103 U.S. App. D.C. 206, 257 F. 2d 210 (1958) and *Airfreight Forwarder Investigation*, 24 C.A.B. 755, 758-59 (1957))
>
> . . . permitting reduced rates to the government, provided only that a tariff was filed *and the differential justified* before the Board. (fn. p. 17 referring to *Slick Airways* v. *United States*, 292 F. 2d 515, 518 (Ct. Cl., 1961))

Enough. In this portion of its Brief (pp. 14-18) Respondent has presented its position that there *may be* circumstances in which a discrimination in rates is justified. But in so doing Respondent has devoted itself to an imaginary controversy. Petitioner has not claimed that "under no circumstances can it [the Government] be entitled to a special rate" as Respondent suggests. (Board Br. 18)

Why did Respondent engage in this seemingly useless exercise? One may surmise that the purpose lies in the hope that assertion and reassertion that "reduced rates may be filed and permitted if justification for the reduction is shown" will tend to establish the validity of the rates by repetition of the implied assumption that justification in fact exists. It should be emphasized, however, that no-

where in this portion of Respondent's Brief has the actual existence and substantiality of such justification been asserted or shown. The absence of such justification is discussed further at pages 12 *et seq.*

IV

CONGRESS DID NOT INTEND THAT SPECIAL RATES SHOULD BE GRANTED TO THE MILITARY—UNLESS JUSTIFIED IN TERMS OF DIFFERENT CIRCUMSTANCES AND CONDITIONS OF CARRIAGE

The Board's question-begging goes beyond the point just discussed. Respondent's brief states:

> Further, if any one fact is clear . . . it is that the Congress expects the military to be accorded such special rates as are found by the Board and other regulatory authorities to be consistent with applicable statutory provisions and purposes. (p. 20)

With the addition of the illusory and qualifying words "consistent with applicable statutory provisions and purposes" that statement is prefectly correct. Indeed, it would be equally correct if the words "any shipper" were substituted for "the military". Accordingly, with these illusory qualifications, the Board's argument is simply irrelevant to the point at issue, which is whether special rates for the military are valid *in the absence of* different circumstances and conditions of carriage.

The clear implication of the quoted statement and of the accompanying text is, of course, that Congress expected the military to be accorded special rates—without qualification. Is there any support for this position? No, and certainly not in the references cited by the Board.

An examination of the Congressional expressions on this subject shows clearly that, while Congress was interested in low rates for the Government, it felt that this objective should be accomplished either by Section 22 or otherwise

within the framework of tariffs which would be generally available to all shippers and thus not violative of the unjust discrimination clause. For example, the principal Congressional expression cited by the Board [1] is the Congressional comment with respect to the proposed repeal of Section 22, and the comment there is entirely in terms of the suitability of tariffs of general applicability (with classifications therein responsive to the needs of the Government) as an alternative for Section 22. Nowhere therein can one find any indication that Congress intended reduced rates for the Government (and not generally available to other shippers) to be provided by any means other than Section 22. As the Senate Report says (at 1785) "Section 22 now allows these unusual needs [rates responsive to the nature of Government traffic] to be met" and the point at issue was whether these Government needs could be served alternatively with tariffs of general applicability.[2]

The Board's language in describing this Congressional intent is usually technically correct but grossly misleading. The Board refers to a favorable Congressional attitude toward "special commodity rates" (p. 20), "published tariff rates which would be appropriate to the large volume movements of government shipments" (pp. 21-2), and "special commodity tariff rates by reason of the volume of shipments" (p. 22)—which is technically correct *if* referring to tariffs of general applicability and *not limited* to the Government as a shipper alone. The clear impression, however, it that *special* rates for the Government *alone* are referred to by Congress—and this is not so.

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[1] Senate Report No. 410, 85th Cong., 1st Sess., to accompany S. 939, June 6, 1957, 1957 U.S. Code, Cong. & Admin. News 1782, 1784-85, and 1786. (Board Br. 21)

[2] Section 22, of course, is a direct expression by Congress that in the instances therein enumerated the reduced rates are to be accorded Government shipments whether or not they are justified in terms of different circumstances and conditions of carriage. The Board's position in effect is that a Congressional approval of elimination of Section 22 manifests Congressional approval of the intent and purposes of Section 22.

The Board stretches this technically correct, but misleading description of Congressional views to the utmost when it says (p. 21):

> The report specifically recognized the appropriateness of a *special* published tariff applicable to government shipments, in concluding: 'As a matter of Government policy, the carriers should be given opportunity under ordinary circumstances to exercise their managerial discretion, either to publish rates applicable on Government traffic in tariffs, or to issue them under Section 22.' (Emphasis supplied)

The tariffs there referred to by the Congress, while applicable to Government shipments, would be equally applicable to all other shippers under like circumstances and conditions—but no hint of this significant fact was permitted to disturb the Board's argument.[3]

In summary, Congress intended either (1) that the Government have special reduced rates, irrespective of differences in circumstances and conditions of carriage, in the cases enumerated in Section 22, or (2) that the Government's interest in low rates be met through tariffs of general applicability in the use of which greater foresight could be exercised by Government agencies.[4]

Equally distorted is the Board's citation of its principal authority for an ancillary proposition—that the omission of Section 22 for cargo transportation by air was due to an affirmative Congressional intent to delegate to the Board the authority to determine the instances where Section 22 objectives (reduced rates for the Government whether or

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[3] This could not be inadvertent for later the Board said again: "As previously noted, Congressional reports also recognize that military traffic should be awarded special treatment." (fn. at p. 28)

[4] "At the same time, it should be noted that your committee is not convinced that Government agencies exercise sufficient foresight or use business-like methods in securing rate adjustments from carriers. The committee urges that the agencies responsible for rate negotiations with the carriers improve their performance in this respect." (Senate Report No. 410, *supra*, pp. 1785-6)

not justified by differences in circumstances and conditions of carriage) would apply in the air (Board Br. 24). The Board's authority is *Capitol Airways* v. *C.A.B.*, 110 U.S. App. D.C. 262, 292 F. 2d 755 (1961). But this case was not concerned in any respect with Congressional omission of a Section 22 for air. More importantly, the language quoted by the Board (p. 24) is not even dicta because the Court was not even commenting on the subject of Congressional omission of a Section 22 for air. Instead, the Court's broad language was prefatory to, and concerned with, the Board's authority for the selection of air carriers to perform contract services for the military establishment where such services were not included within their operating authority otherwise, *i.e.*, the Board's authority to grant *exemptions* from *certificate requirements* of the Act. The *Capitol Airways* case is wholly irrelevant here.

The only other basis for this asserted Congressional intent is a hypothetical problem for which omission of a Section 22 for air was "the Congressional solution" (Board Br. 19-20). This is equally misrepresented for no such problem exists. The asserted problem is that "a provision such as Section 22 would have enabled the carriers to grant reduced rates to the government completely free of regulatory control" (Board Br. 20). This narrow view of the Board's power and this interpretation of Section 22 are, however, directly contrary to the square holding of the Supreme Court in *Nashville C. & St. L. R. Co.* v. *Tennessee*, 262 U.S. 318 (1923), cited by the Board (p 16). Section 22 does *not* foreclose regulatory scrutiny and adjustment of Section 22 rate quotations in instances, for example, of undue prejudice as in the *Nashville* case. There is, in short, neither the problem nor the Congressional intent in respect thereto asserted by the Board.[5]

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[5] Nor does the legislative history cited by the Board (p. 19) indicate any such intent. Concern about control over mail rates would be relevant to the specific Congressional action in respect to mail—Section 405 of the Act, 72 Stat. 760, 49 U.S.C. 1375. But no basis appears for the Board's bland assertion that this concern about air mail rates extended to rates for the transportation of persons and property covered under other sections of the Act.

The complete answer to the Board's position with respect to Congresional intent (and the full measure of the Board's misstatement of that Congressional intent) may be found in the earlier holding of the Board itself in *Certificated Air Carrier Military-Tender Investigation*, 28 C.A.B. 902 (1959), which is relied upon heavily by the Board in its brief in other respects. In the *Military-Tender* case the Board affirmatively found:

> 3. Aside from the considerations of competitive necessity and lower costs of service, the military establishment urges the approval of the 10-percent military discount, as a matter of law, because the Federal Government is the beneficiary. However, there is no provision in the Act which expressly authorizes the granting of reduced-rate air transportation to the Federal Government, *nor does our review of the legislative history of the Act manifest any intention on the part of the Congress to permit preferential treatment of official military or Government travel.* [Citing cases.] Also, while there are dicta of the Supreme Court indicating that discrimination in favor of the Government is permissible without specific statutory authorization, [citing cases] we are unable to find a square holding to that effect. (Emphasis supplied)

Was the Board right in 1959? Certainly, this portion of the Board's 1959 holding was in conformity with the views of the Court in *Slick Airways, Inc.* v. *U.S.*, 292 F. 2d 515, 517 (Ct. Cl. 1961). But the Board's 1959 holding is directly contrary to the position asserted in its present brief.

Parenthetically it may be noted that the post-legislative history upon which the Board relies (Br. 20) is entitled to little weight. See *Budd Company* v. *United States*, 145 F. Supp. 792 (E.D. Pa. 1957), *aff'd* 252 F. 2d 456 (3d Cir. 1957) where the Court said (at pp. 799-800):

> The Government relies on language used in reports of Congressional Committees and of the Association of the Bar of the City of New York, concerning proposals to amend the Internal Revenue Code, to support its contention. . . . However, even if the language used in these reports was applicable to this situation, *non-*

judicial statements as to the meaning of statutory language *made after the enactment of the statute may not be considered in construing the statute.* See Fogarty v. United States, 1950, 340 U.S. 8, 13, 71 S. Ct. 5, 95 L.Ed. 10; and United States v. United Mine Workers, 1947, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L.Ed. 884. (Emphasis supplied)

V

THERE IS NO BASIS—OTHER THAN JUSTIFICATION IN TERMS OF DIFFERENT CIRCUMSTANCES AND CONDITIONS OF CARRIAGE—UPON WHICH DISCRIMINATORY RATES MAY BE VALIDATED

The Board suggests two alternative bases of authority for its approval of Pan Am's special impedimenta rates. One is the Board's authority under Section 416(b) of the Act (72 Stat. 771, 49 U.S.C. 1386(b)) "to exempt carriers from any requirement of the Act" (Board Br. 18). The short answer to this point is that the exemption authority of Section 416(b) can only be exercised by the Board in accordance with the standards therein specifically set forth and the administrative procedures with respect thereto (*e.g.* findings that the applicable standards are met).[6] The proceeding below does not even purport to be a proceeding under Section 416(b) of the Act, much less apply the standards requisite to the use of Section 416(b) authority.

The second alternative basis of authority asserted by the Board is in Section 403(b) itself, which authorizes the Board "to prescribe regulations permitting additional categories of free and reduced-rate transportation" (Br. 18). The Board asserts that this authority applies to both per-

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[6] Section 416(b) exemptions can be granted by the Board only "if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

sons and property "and, in our view, Tiger erroneously contends that the Board's powers in this area are restricted to the transportation of persons." (Br. 19) The Board's view, however, is clearly and directly contrary to the express language of Section 403(b). (Pet. Br. 38) Section 403(b) states: "Nothing in this chapter shall prohibit such air carriers . . . from issuing or interchanging tickets or passes for free or reduced rate transportation *to* [defined categories of persons] . . . and, in the case of overseas or foreign air transportation, *to* such other persons and under such other circumstances as the Board may by regulations prescribe." (Emphasis supplied) Everything in the sentence applies to "issuing or interchanging tickets or passes . . . to persons . . .". Tickets or passes are universally recognized as applicable to the transportation of persons and not the transportation of property.

This is not merely Petitioner's view of the matter, however. The Supreme Court also says so in a square holding on corresponding language in the Hepburn Act, 34 Stat. 584, 587 (1906), amending the Interstate Commerce Act, *inter alia*, by bringing express companies within the terms of that Act. Section 1(7) of the Interstate Commerce Act, as amended by the Hepburn Act, (49 U.S.C. § 1(7)), provided that

> No common carrier subject to the provisions of this act shall . . . issue or give any interstate free ticket, free pass or free transportation for passengers, except to [defined categories of persons]: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; . . .

The express companies relied on the language of the proviso therein (permitting "interchange of passes") as permitting them to issue and interchange documents called "franks" for the free transportation of personal packages. In *American Express Company* v. *United States*, 212 U.S.

522 (1908),[7] the Court held that the section could not be construed to include the transportation of goods:

> Turning to § 1 of the Hepburn act, it is apparent that all that immediately precedes the proviso appertains to the carriage of passengers, for common carriers are forbidden to issue or give any free ticket, free pass, or free transportation *for passengers* except to its employees, etc. Until we come to the proviso, the act is clearly thus limited. (at 534)
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> * * * * * * * * *
>
> But we are to consider the language which Congress has used in passing a given law, and, when the language is plain and explicit, our only province is to give effect to the act as plainly expressed in its terms. We are clearly of the opinion that, without doing violence to the language used in § 1,—including the proviso—its terms cannot be held to include the transportation of goods. (at 535)

VI

THERE IS NO JUSTIFICATION—IN TERMS OF DIFFERENT CIRCUMSTANCES AND CONDITIONS OF CARRIAGE —FOR PAN AM'S SPECIAL IMPEDIMENTA RATES

The only remaining basis for approval of Pan Am's special impedimenta rates is by affirmative justification in terms of differences in the circumstances and conditions of carriage. Respondent attempts such justification at pages 24-34.

At the outset it may be noted that the Board does not contest Petitioner's identification of the established three-prong test for "unjust discrimination": (a) that the services are "like and contemporaneous", (b) that the transportation is of "like traffic", and (c) that the transportation services are rendered under "substantially similar circumstances and conditions".[8]

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[7] *Accord, Legality of Express Franks*, 50 I.C.C. 599 (1918).

[8] Pet. Br. 12; Board Br. 25.

However, in applying the above test the Board makes essentially three points:

First, that the Board is not "required to limit its consideration solely to matters directly relating to the actual carriage of the property" (p. 26);

Second, that the findings in the *Military Tender* case, *supra*, are applicable to and determinative of the present case (p. 30); and

Third, that there are inherent differences in military traffic which, being identified in earlier cases, can be applied here without further hearing or findings (pp. 28, 32).

A. As to the Consideration of Factors Beyond "What Relates to the Carriage Only".

With one possible exception of limited applicability, it is the established rule that the "circumstances" justifying different rates for similar commodities must be in terms of "what relates to the carriage only" (Pet. Br. 16). The only exception which appears anywhere is that represented by the three cases noted in Petitioner's Brief (p. 16) in which competitive factors not directly a part of the carriage were found bases for support of rate differentials. In each of the three cases the rates were equally available to all shippers.[9]

The Board has not cited a single case indicating any other exception to the established rule.[10]

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[9] In *Eastern-Central Motor Carriers Ass'n.* v. *U. S.*, 321 U.S. 194 (1944), truck rates based on minimum weight for rail car, rather than truck, capacity permitted; in *Barringer & Co.* v. *U. S.*, 319 U.S. 1 (1943), elimination of loading charges for some cotton shipments only to meet truck competition permitted; *Texas & Pac. Ry. Co.* v. *I.C.C.*, 162 U.S. 197 (1896), import rates for land portion of through rates lower than domestic rates for similar commodities permitted.

[10] In *I.C.C.* v. *Balt. & Ohio Ry. Co.*, 145 U.S. 263 (1892), the Court emphasized that tickets for group travel (designed for theatrical troupes) were available to all the public and the lower volume rate therefore was nondiscriminatory. It is in that case that is found the dicta quoted by Respondent concerning the "illustrative" and non-"exclusive" characteristics of Section 22. However, that dicta was severely circumscribed in *Nashville, C. & St. L. Ry.* v. *Tenn.*, 262 U.S. 318 (1923), and has lain unnoticed since then until resurrected by Respondents here.

B. As to the Application of Findings in Military Tender to the Present Case

The Board seeks, both in its decision which is here presented for review, and in its Brief, to support Pan Am's special impedimenta rates by reference to its findings in the *Military Tender* case. (Br. 30) To the extent that the *Military Tender* case can support the Board's decision here, then the basis of decision in that case is inevitably presented for review here. In this connection it should be noted that the findings in *Military Tender* here relied upon have never been judicially reviewed and the absence of such judicial review is not due to this Petitioner, which, as a scheduled cargo carrier had no standing in, and therefore did not participate in, that case involving passenger travel.

Even on the present skimpy record, however, it is abundantly clear that the facts of the two cases are so different as to negative application of *Military Tender* here. *Military Tender* involved passenger travel domestically and the special rates for the military there approved by the Board were for the purpose of permitting air carriers to compete with surface carriers which had granted a special rate to the military under Section 22.[11] The present case involves a special rate to the military for *cargo* moving *overseas*. The Board does not challenge Petitioner's assertion that "there is no significant competition between ships and planes in the movement of military cargo over-

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11 Whether this competition is sufficient justification for a special air cargo rate for the military is open to serious question. Since the resulting rates are limited to one shipper only—the military—the decision extends the scope of the "circumstances" which can justify discriminatory rates far beyond that in any of the decided cases. Furthermore, it is especially questionable whether the Board can authorize a discriminatory rate for air (where Congress *refused* to provide an exemption) for the express purpose of facilitating competition with a discriminatory surface rate (for which Congress *did* provide an exemption). *Military Tender* flaunts Congressional intent. Since this competition factor was the principal basis of the *Military Tender* decision we need not consider here other even more dubious parts of the decision, *e.g.* see p. 15, fn. 12, *infra*.

seas." (Pet. Br. 25) The findings in *Military Tender* have absolutely no relevancy to the present case.

C. As to Inherent Differences in Military Traffic Recognized in Other Cases Which Can Determine the Present Case by Reference

The crux of the Board's case is found finally in its broad and vague generalization that "special rates for military traffic find support in general case law." (Br. 27) This is supported by a specific statement that the Interstate Commerce Commission "has also recognized that 'the traffic of the Army and that of other shippers is not "like traffic" within the meaning of Section 2 of the Act . . .' [citing cases]." (Br. 28)

It is presumably the Board's position that these differences between the traffic of the Army and that of other shippers are so *inherent* as to warrant application here without further investigation or fact-finding in respect to the circumstances of this particular case. Otherwise the Board could not sustain its case—since there has been no investigation or fact-finding here.[12] An examination of the cases cited by the Board reveals not a single one supporting this position.

Moreover, there is not a single case (with the exception, of course, of decisions of the Board itself) which supports even the Board's more limited statement that (in specific situations) it has been "recognized that 'the traffic of the Army and that of other shippers is not "like traffic" . . .'." so that discriminatory rates (presumably in favor of the Army, if the Board's statement is to have significance) were not unjust. No better illustration of this can be made than by analysis of the two sets of cases principally relied upon

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[12] That this is the Board's position is also indicated by its strong reliance here (stronger than the Board's position in the *Military Tender* case itself) on the Board's position in the *Military Tender* case that "the fact that the Federal Government is the recipient of the discriminatory military fare discount is itself another [justifying] circumstance or condition . . ." "The Court need go no further here", says the Board. (Br. 32)

by the Board, both styled *United States of American* v. *Aberdeen and Rockfish Railroad, et al.*[13] It will be obvious that Respondent has failed to read (it has not even cited the cases fully) what the Interstate Commerce Commission meant by the quotation so neatly truncated (Board Br. 28). It has failed to see that those cases oppose rather than support Respondent's contention here.

In Norfolk and in New Orleans during the last war, the Army took possession and control of piers theretofore leased and operated by public wharfingers, acting as agents for line haul carriers. These carriers had absorbed wharfage and handling charges for export freight incurred on these public piers as well as on carrier-owned and operated piers, but they made no such allowance for private piers. The carriers refused to make the Army an allowance for wharfage and handling when it took over the piers or to provide wharfage and perform the handling service themselves.

Initially the Army sought an allowance for wharfage and handling under Section 22 but the carriers refused. The Army then contended that it was entitled to the allowance out of the line haul tariff previously given to its predecessor, the public wharfinger. In alleging unjust discrimination the Army sought not *special status* but *equal treatment* to that accorded commercial interests operating public piers. The carriers contended that the piers taken over by the Army became private piers to all intents and

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[13] *The Norfolk* case: 263 I.C.C. 303 (1945) (award to Army); reconsideration, 264 I.C.C. 683 (1946) (reversed); reargument, 269 I.C.C. 144 (1947) (affirmed); U.S. v. I.C.C. 78 F. Supp. 50 (three judge statutory court dismissed on ground Government cannot sue itself); reversed and remanded, 337 U.S. 426 (1949); I.C.C. sustained, 92 F. Supp. 998; reversed as not supported by record and remanded to I.C.C., 198 F.2d 958, 91 U.S. App. D.C. 178 (1951); cert. denied, 344 U.S. 893 (1952); upon further hearing and reconsideration, decision against the Army in 264 I.C.C. 683 affirmed, 293 I.C.C. 219 (1954).

The New Orleans case: 266 I.C.C. 45 (1946) (*sub nom. Patterson* v. *Aberdeen and R. R. Co.*) (Army complaint dismissed); further hearing and reconsideration, 293 I.C.C. 219 (1954) (affirmed).

purposes and that carriers did not and need not pay allowances to private pier operators and shippers for wharfage or for handling export freight and they did not and need not perform that service on private piers.

The Interstate Commerce Commission, in the course of lengthy and prolonged hearings, punctuated by judicial review, upheld the carriers. It considered *in extenso* the differences in the handling before and after the line haul, of traffic over public piers and over Army piers. It found that the Army was an operator of private piers and that its traffic in respect solely of the wharfage and handling thereof was not "like" traffic of shippers moving over public wharves.

In its final report the Interstate Commerce Commission stated in 293 I.C.C. 219:

> In the report on reconsideration we found that when the complainant took over the Army base piers, the method of handling the traffic moving over them was completely changed, and that no longer did the defendants have supervision, through their agent, the terminal corporation, over the traffic. The complainant had possession and complete control of the freight. We also found in the report on reconsideration, at page 688, that the freight of other shippers which received the unloading service, was not "like traffic". It was unlike, *in one sense*, in that it was not in the possession of and under exclusive control of the owners, as was that of complainant, and that the handling of it was performed at facilities supplied by the railroads, not the Army. (Emphasis supplied)

Thus the Army was not entitled to special treatment as Army nor did its traffic justify special classification because it belonged to Army; on the contrary, the Army was simply another private pier operator and it was not entitled to a rate allowance any more than was any other private pier operator.

Respondent also supports its general statement that "special rates for the military find support in general

case law" by asserting that "such special rates may be justified as a special commodity classification, and accordingly as not constituting 'like traffic' ". (Br. 27) The cases cited for this point illustrate merely the conventional, well settled rule that classifications based upon differences in the physical or use character of commodities may command differences in rates—coarse grains compared to wheat;[14] building lime contrasted to agricultural and chemical lime;[15] saw logs versus pulp wood;[16] or ship steel plates[17] against other steel plates.[18]

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[14] *Board of Trade of City of Chicago* v. *C. & A. R.R. Co.*, 27 I.C.C. 530, 534-35 (1913).

[15] *Washington Building Lime Co.* v. *Arcade & A.R. Corp.*, 174 I.C.C. 577, 579-80 (1931).

[16] *Curry & Whyte Co.* v. *D. & I. R. R.R. Co.*, 32 I.C.C. 162, 168 (1914).

[17] *Willamette Iron & Steel Works* v. *Baltimore & O. R.R. Co.*, 25 F.2d 522, 523 (D.C. Ore., 1928), aff'd, 29 F.2d 80 (9th Cir. 1928).

[18] Similarly, the other cases cited with respect to classification principles, *e.g.* volume, (Br. 28-9, fn. 30, 32, 33) merely reflect undisputed rules irrelevant to the issues here.

In this connection Respondent also asserts that "a tariff applicable only to military property moving under government bills of lading is merely the familiar definition of the classification, rather than a differentiation between shippers." (Br. 29) The case which comes closest to proving Respondent's point is *United States* v. *A & V. Ry. Co.*, 40 I.C.C. 405 (1916), where the ICC approved a tariff for stamped postcards, etc., shipped under government bills of lading. The Commission went out of its way, however, to provide in that case that the classification and rate would be equally available to any other shippers who might be shipping similar items—so that the government bill of lading aspect of the definition was not limiting. In the present case the rates are applicable only to shipments by the government. We repeat, so far as we are aware, there is no case supporting Respondent's position.

As for Respondent's reference to military impedimenta tariffs which have been on file "for years" by the rail and motor carriers (Br. 29) the simple answer is that these carriers had authority to reduce rates to the military under Section 22 and a differentiation between the military and other shippers is not prohibited for these carriers. With respect to Respondent's reference to Flying Tigers' impedimenta tariffs the simple answer is that, as long as the Board permits its competitors to use military impedimenta tariffs, Flying Tigers must use them. It is pertinent to note, however, that for the surface portion of its air surface impedimenta tariffs, Flying Tigers prorates to participating truckers on the basis of their regular class rates; the truckers do not themselves have impedimenta tariffs.

However, in no case cited by Respondent (and in no case found by Petitioner) does the classification ever turn upon the character of the shipper.[19] In the lead case for Respondent, *Board of Trade* v. *C. & A.R.R. Co., supra,* the Interstate Commerce Commission in upholding a higher rate for wheat than for coarse grains, pointed out that the test for undue preference to one commodity and undue prejudice to another is found in Section 3 of its Act and not in Section 2, *but* it stated

> If inequality results from the exaction of a special rate to one shipper and a different rate to another upon like traffic contemporaneously transported under substantially similar circumstances and conditions, the section [i.e., 2] is violated.

VII

UPON THE RECORD BEFORE IT, THE BOARD SHOULD NOT HAVE DISMISSED FLYING TIGER'S COMPLAINT

Petitioner's case in support of this proposition is set forth at pages 21-26 of its Brief. The Board's answer to it is twofold.

First, the Board asserts in effect a waiver by Petitioner of an evidentiary hearing. In support of the waiver concept, it says that "Tigers stated that it did not *desire* a hearing . . ." (Br. 34) (Emphasis supplied) This misstates the record. Petitioner's position to the Board was that "the issue posed is purely legal" and, accordingly, "there is no reason, need or requirement for an evidentiary hearing". (Tr. 24) Petitioner's views as to the dispensability of a hearing were expressly based upon and therefore

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[19] Not even the *Savery* case cited by Respondent (Br. 31) so holds. The immigrant rates were for entirely different accommodations. "This special class of persons are given accommodations, essentially different to those provided for others, in cars specially set apart for their use, and which are commonly made up into trains by themselves and returned to the seaboard empty. The service is thus seen to be special, and the rates charged correspond to it." *Savery & Co.* v. *N. Y. Central & Hudson River R. Co.*, 2 I.C.C. 210, 218 (1888).

limited to Board consideration of the case as then in prospect—wherein only legal issues would be considered.[20] When and to the extent that the Board turned to a consideration of the factual justification, if any, for the special impedimenta rates, the Board necessarily changed the posture of the case and the issues ceased to be purely legal. Thereafter the view previously expressed by the Petitioner as to the need for an evidentiary hearing could not be deemed to continue unaltered.

Second, Respondent asserts that it has discretionary authority under Section 1002(a) of the Act to dismiss a complaint "whenever the . . . Board is of the opinion that any complaint does not state facts which warrant an investigation or action . . ." (p. 35). The Board recognizes, however, that this authority cannot be exercised unreasonably and it justifies its exercise in the present instance in these terms:

> In the light of the Board's previous exhaustive study of the question here involved, and its continuous scrutiny, evaluation, and approval of tariffs identical to those here in issue (see counterstatement), it is clear that there was no abuse of discretion in declining to relitigate previously determined factual issues which were not even challenged in the complaint. (p. 36)

As we have demonstrated under point VI above, the "Board's previous exhaustive study of the qeustion here involved" applied to an entirely different set of circumstances (the transportation of passengers, not cargo, domestically not internationally; the impact of rail competition; the savings in cost of military traffic compared to non-military passengers; the cost of the service compared to its revenue; all based upon statistics and opinion of the domestic market) and that study is wholly inapplicable to

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[20] This posture of the case at that time is confirmed by Pan Am's answer which sought dismissal of Flying Tigers' complaint on purely legal issues and, if these issues were not determinative, then sought a full evidentiary hearing. (Pet. Br. 23 *et seq.*)

the present case (the transportation of cargo overseas in which there is no competition between air and surface modes). The Board is right in recognizing that dismissal of Flying Tigers' complaint requires justification but the complete irrelevancy of its justification confirms the error in dismissal of that complaint.

CONCLUSION

Respondent has failed to meet the essential issues. Pan Am's special impedimenta rates are illegal. Pan Am should be required to discontinue them forthwith.

Respectfully submitted,

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January 18, 1965

PETITION FOR REHEARING EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,859

THE FLYING TIGER LINE INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,359

THE FLYING TIGER LINE INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

On Petition for Review of Order of the Civil Aeronautics Board

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PETITION FOR REHEARING EN BANC

The Flying Tiger Line Inc. respectfully petitions the Court to rehear this case en banc upon the grounds 1) that the questions presented are of major importance in the administration and application of the provisions against unjust discrimination in the Federal Aviation Act of 1958 and the corresponding provisions of other regulatory statutes and 2) the decision herein, dated June 17, 1965, represents a substantial departure from the prior case law on these questions as enunciated in prior decisions, including decisions of the Supreme Court of the United States. Such a departure

from prior law on the interpretation of key prohibitions in basic regulatory statutes affecting all forms of transportation merits consideration by the entire membership of this Court.

I

THE QUESTIONS PRESENTED AND THE STATUTES INVOLVED

At issue is the interpretation of the unjust discrimination prohibitions in Section 404(b) of the Federal Aviation Act of 1958, as amended, 72 Stat. 760, 49 U.S.C. § 1374(b), and the comparable provisions of other regulatory statutes with respect to the railroads,[1/] the motor carriers,[2/] the water carriers,[3/] and the freight forwarders.[4/] The pertinent portions of these statutes are set forth in the Appendix to Petitioner's Brief.

Both parties and the Court are agreed that the prohibitions against unjust discrimination in these statutes apply if a) different rates are charged for a "like and contemporaneous" service, and b) the transportation service

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1/ Sections 2 and 3 of the Interstate Commerce Act, 24 Stat. 379, 380 (1887), as amended, 49 U.S.C. § 2, 3.

2/ Section 216(d) of the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d)).

3/ Section 305(c) of the Interstate Commerce Act, as amended, 49 U.S.C. § 905(c).

4/ Section 404(b) of the Interstate Commerce Act, as amended, 49 U.S.C. § 1004(b).

involves a "like kind of traffic" and c) the transportation service is performed under substantially similar "circumstances and conditions". (Decision, June 17, 1965, p. 4, ftnt. 3).

In the decision of June 17, 1965, however, the Court added a new and additional condition which must be met before a rate difference will constitute unjust discrimination; the Court held that there must be a showing of "substantial injury to shippers in order to require the Board to take action". (Decision, p. 6). This requirement that "substantial injury" be shown, is enunciated for the first time in the long history of the Interstate Commerce Act and the related statutes in which corresponding prohibitions against unjust discrimination appear. Significantly the point was not briefed by either party.[1/]

The decision of June 17, 1965, also overturns the long established rule that a difference in transportation rates based solely upon the identity of the shipper is unjust discrimination and illegal as a matter of law. Ice v. Delaware, L. & W. R.R. Co., 220 U.S. 235 (1911).

Changes of such magnitude warrant reconsideration by the full Court.

1/ Except for the tangential footnote reference in the Board's Brief (p. 30, ftnt. 35) citing Baltimore & O. Ry. Co., 145 U.S. 263, 281 (1892). This case is discussed at page 4, infra.

II

SUBSTANTIAL INJURY NEED NOT BE
SHOWN TO ESTABLISH UNJUST DISCRIMINATION

The decision of June 17, 1965 rests fundamentally upon the Court's holding that "Petitioner's complaint [to the Board] had to make a plausible case that Pan American's rates would cause some substantial injury to shippers in order to require the Board to take action." (pp. 5-6). The Court's view that "substantial injury" 1/ would have to be shown in order to require the Board to take action is at variance, however, with the law on unjust discrimination.

It is at variance, first of all, in that no such requirement appears in the relevant statutes. So far as the statutes express the matter, every difference in rates for a

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1/ Because, as we will show herein, no proof of substantial injury is required to establish unjust discrimination, it is unnecessary to consider the subsidiary question of whether the injury to be proven is an injury to shippers as distinguished from other persons injured by the discriminatory rate, for example, competing carriers. While the objective of the unjust discrimination prohibition is frequently cited as the protection of shippers, the Act has not been so limited. For example, in Shaw Warehouse Co. v. Southern Railway Co., 288 F.2d 759 (1961), after reviewing cases in which such a limitation was asserted, the Court said: "These cases...establish the principle, pertinent here, that for purposes of determining discrimination relating to transportation, a warehouseman, aggrieved by a carrier's favored treatment of a competing warehouseman, comes within the long protective reach of the Act — although he may not be a shipper and although the alleged discrimination itself is primarily of a nontransportation nature." (p. 770). We note that the present decision cites ICC v. Baltimore & O. Ry., 145 U.S. 263, 281 (1892) with respect to (but not in direct support of) the

"like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" is denominated an "unjust discrimination" and "declared to be unlawful". The quoted language is from Section 2 of the Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 2. As noted above, both parties and the Court recognize that the standards of § 2 of the Interstate Commerce Act apply also to the other statutes, including the Federal Aviation Act of 1958. No requirement of "substantial injury" can be found in the statutes.

Secondly, the Court cases confirm that substantial injury does not have to be shown to establish the illegality of rates upon the ground of unjust discrimination. This confirmation appears in cases which draw a clear distinction between private civil actions (in which shippers seek to recover damages from transportation companies because they have been charged rates which are illegal by reason of the unjust

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1/ Cont.: proposition that "Section 404(b)...exists to protect shippers, not carriers." (p. 5). No other citation for the proposition appears. Significantly, in the 1892 Baltimore case, the Court said that "If it be lawful to issue these tickets..." then the competing carrier could not complain because it could do likewise. (p. 281, emphasis supplied). The Court made the lawfulness of the special rate an express condition of its comment, thus indicating that a competing carrier could properly complain of an unlawful rate. The 1892 Baltimore case is not in conflict with Shaw, supra, or the cases reviewed in Shaw, holding that "the long protective reach of the Act" is available to persons who are not shippers. See also Union Pacific R. Co. v. United States 313 U.S. 450 (1941) concerned entirely with the disadvantage to competing railroads, rather than competing shippers, resulting from the discrimination there corrected.

discrimination prohibitions) on the one hand and criminal prosecutions for, or agency correction of, such illegal rates, on the other hand. In the former instance actual damages must be shown. In the case of criminal prosecutions or direct agency action to correct illegal rates, as in the case at bar, proof of actual injury is not required.

The principal case on this point is Pennsylvania R. Co. v. International Coal Mining Company, 230 U.S. 184 (1913). In that case a shipper sought to recover the difference between the rates actually charged to it and the lower discriminatory rates offered to others. Key to the decision was that "it is a noticeable fact in its pleading the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury." (p. 197-8). The Court then held that such damage or injury had to be alleged and proved in such a civil action; in so holding it drew a clear distinction between such private civil actions and criminal prosecutions or corrective actions by the regulatory agencies.

The distinction in the Pennsylvania case between private civil actions (where injury must be proven) and criminal prosecutions or agency corrective action (where injury is not essential to establish unjust discrimination) has been confirmed as recently as 1961 in two decisions by the United States Court of Appeals for the Fifth Circuit. Shaw Warehouse

Co. v Southern R. Co., 290 F.2d 759 (1961); on rehearing, 294 F.2d 850 (1961). In that case the Interstate Commerce Commission had found a violation of § 2 of the Interstate Commerce Act (unjust discrimination) and issued its cease and desist order to the Southern Railway Company. The order was in turn affirmed by a statutory three-judge court. In the separate civil action brought against the Southern Railway Company, however, the Court's instructions to the jury and the jury's verdict in favor of the Southern Railway Company were upheld on appeal despite the obvious conflict with the I.C.C. holding as to the illegality of the charges. The conflicting results were reconciled by the Court of Appeals by reference to the difference between the standards applicable in I.C.C. enforcement proceedings (where injury was not pertinent) and private civil actions (where injury is pertinent):

> ...Proceedings before a public agency and proceedings in a private suit for damages are different in objectives, breadth of approach, and issues. Not the construction of the Commerce Act but the application of the Act is different. Once over the hurdle of the motions to dismiss, this case was a factual one for the jury to decide. The jury had before it considerable evidence not contained in record of the Commission's proceedings. And, the important questions of causation and injury, which may have been crucial in the minds of the jurors, were not present in the I.C.C. proceedings. (p. 851-2, emphasis supplied).

From these cases it is clear that proof of injury is not essential to proof of the illegality of transportation rates on the ground of unjust discrimination, although it may be in civil suits for damages suffered thereby. The decision of this Court of June 17, 1965 is in conflict with these cases. 1/

1/ It is significant to note that the possibility that a private civil suit remedy for unjust discrimination might be frustrated by the requirement of proof of injury led to dissents in both the initial Pennsylvania case in 1913 and the second Shaw Warehouse case in 1961. The decision of June 17, 1965 is, of course, even more at odds with the views of these dissents; it would extend the injury requirement to those cases wherein even the majority held it was not applicable.

III

A DIFFERENCE IN TRANSPORTATION RATES BASED SOLELY UPON THE IDENTITY OF THE SHIPPER IS ILLEGAL AS A MATTER OF LAW

Pan American's rates are, by the express terms of the tariff, limited to one shipper, the United States Department of Defense. The tariff thereby excludes all other shippers irrespective of the similarity, if any, of such other shippers' "traffic" or the "circumstances and conditions" attending its carriage. Accordingly, the difference in the rates offered to the Department of Defense, compared with rates available to other shippers, is solely in terms of the identity of the shipper.

It is clearly established that, where the only difference is in the identity of the shipper, different rates are illegal as a matter of law:

> The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. ICC v. Delaware, L. & W. R.R. Co., 220 U.S. 235, 252 (1911).

To the same effect, Wight v. United States, 167 U.S. 512 (1897); ICC v. Alabama Midland Ry. Co., 168 U.S. 144 (1897); ICC v. Baltimore & Ohio R.R. Co., 225 U.S. 326 (1912). See also Petitioner's Brief, pp. 13-17.

Nevertheless, the decision of June 17, 1965, states: "Nothing advanced at argument persuades us that Pan American's rates are illegal as a matter of law under the criteria set out in note 3, supra." (p. 5). This holding is in direct conflict with the Supreme Court cases just cited since Pan American's rate difference is solely in terms of the identity of the shipper. 1/

It should be noted that not even the Board asserts a position so at variance with prior cases. The Board seeks instead to justify the discriminatory rate in favor of the Department of Defense by asserting that government traffic is not "like traffic" and involves different "circumstances and conditions" when compared with traffic of other shippers.

1/ This holding is without further explanation except as it may also be related to the Court's view on the need for proof of substantial injury, discussed above, a matter not entirely clear. The only other basis which appears is the Court's holding that the Board's duty to investigate complaints "is a duty to exercise its sound discretion" citing Flight Engineers Int'l. Assn. v. CAB, 118 U.S. App. D.C. 112, 332 F2d 312 (1964). Assuming that the Board has such discretion, the question nevertheless remains as to whether there was any abuse of discretion in dismissing the complaint.

But the Board's asserted justification is not available to support the Court's decision - for two reasons.

The first of these reasons is that the Court expressly removed the Board's asserted justification, and Petitioner's denial thereof, from any consideration in reaching its decision. "We find it unnecessary to pass on either." (Decision, p. 5). If there are any justifying disciminanities in the traffic involved or the circumstances and conditions attending its carriage (the existence of which is, of course, expressly precluded by the very terms of the Pan American tariff)[1/] their consideration was expressly excluded by the Court and cannot support the decision.

The second of these reasons is that the Court's comments clearly indicate that, were it actually to consider the Board's justification, it would rule against the Board. The special circumstances which might justify Pan American's special rates for the Department of Defense were, says the Board,

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1/ If the traffic of the Department of Defense is in fact different, justifying a different rate, then the different rate would, at least, have to be available to any other shippers who might conceivably have like traffic under similar conditions and circumstances to that of the Department of Defense. This was the situation in United States v. A & Y Ry. Co., 40 I.C.C. 405 (1916) where, in approving a tariff for stamped postcards, etc., shipped under government bills of lading, the ICC went out of its way to provide that the classification and rate would be equally available to any other shippers who might be shipping similar items. But the present Pan American tariff categorically forecloses any such availability to other shippers.

developed in its "previous exhaustive study of the question here involved" (Board Brief, p. 10) referring to its Military Tender Investigation, 26 C.A.B. 502 (1958). The Court noted that, in dismissing Flying Tigers' complaint, "the Board relied chiefly on its conclusion in Military Tender Investigation ..." (p. 4). But the Court then pointed out that any justification which may have been developed in Military Tender Investigation was wholly irrelevant to the present case. (p. 6).

In summary, the Board's own justification for Pan American's discriminatory rates was expressly excluded from formal consideration by the Court, and a clear indication given that, even if considered, the justification would be found inadequate - yet inexplicably the decision is for the Board!

CONCLUSION

In view of the widespread impact of the questions here presented and the radical departure from prior law represented by the present decision on these questions and the lack of clarity as to the basis of decision (if it rests on grounds not in conflict with present law), we respectfully seek rehearing en banc and request that on such rehearing the Court declare that Pan American's special impedimenta rates are

illegal as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Edwin Jason Dryer, attorney for Petitioner, The Flying Tiger Line Inc., do hereby certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for delay.

Edwin Jason Dryer